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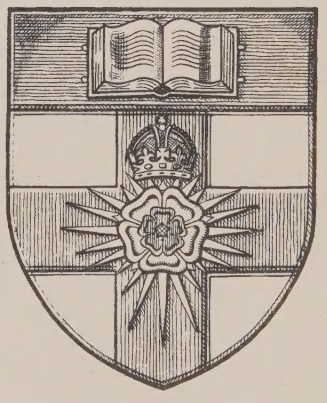

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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

XLVI & XLVII VICTORIÆ.

BRADLAUGH *v.* NEWDEGATE.

1883
April 23.

Maintenance, Action for—Common Interest, what amounts to.

The plaintiff having sat and voted as a member of Parliament without having made and subscribed the oath appointed by the 5th section of 29 & 30 Vict. c. 19, the defendant, who was also a member of Parliament, procured C. to sue the plaintiff for the penalty imposed by that section for contravention thereof. C. was a person of insufficient means to pay the costs in the event of the action being unsuccessful. After the commencement of the action the defendant gave to C. a bond of indemnity against all costs and expenses he might incur in consequence of the action. It was ultimately decided in the House of Lords that the above mentioned section does not enable a common informer to sue for the penalty, and that therefore the action would not lie. The plaintiff brought an action for maintenance against the defendant:—

Held, that the defendant and C. had no common interest in the result of the action for the penalty; that the conduct of the defendant in respect of such action amounted to maintenance; and that the action for maintenance was therefore maintainable.

FURTHER CONSIDERATION before Lord Coleridge, C.J.

The action was for maintenance.

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The facts and the nature of the arguments sufficiently appear from the judgment.

March 9, 17. *Crump*, and *Hunter*, for the plaintiff.

Kydd, *Wilfred Allen*, and *Woodfall*, for the defendant.

The following authorities were cited in addition to those referred to in the judgment: *Hunter* v. *Daniel* (1): *Williamson* v. *Henley*. (2)

Cur. adv. vult.

April 23. LORD COLERIDGE, C.J. This action was heard before me on the 9th and the 17th of March in this year. The facts upon which the action was grounded, if the action would lie, were undisputed; the principle upon which the damages, if any, were to be calculated was in like manner agreed to. The jury were accordingly discharged. The facts and arguments in the case were proved and heard before me alone, and I am now to deliver judgment. My judgment is, as I was informed, to be appealed from, and I was therefore inclined to send the respondent, whoever he might be, to the Court of Appeal unweighted by any reasons of mine. But, as the subject of the action is not common, and the authorities which deal with it are not familiar to every one, I have thought it best upon the whole to state not only my judgment but the grounds of it.

The plaintiff and defendant are both members of the House of Commons, and the plaintiff had voted in the House of Commons and sat there during a debate after the Speaker had been chosen without having made and subscribed the oath appointed by 29 & 30 Vict. c. 19, s. 5. The defendant appears to have been anxious to sue the plaintiff for the penalty of 500*l.* which is imposed by the section I have quoted, and to which under the circumstances the plaintiff had become subject. He went at once to his own solicitor's office, in Gray's Inn Square, and what took place I will state in the words of that gentleman, who was examined as a witness before me. "In June, 1880, I remember Mr. Newdegate coming to my office. It was late in the day. Before this day he had told me that he anticipated Mr. Bradlaugh

(1) 4 Hare, 420. (2) 6 Bing. 299.

would apply to take his oath and his seat; that, if he voted without taking the oath, he would be liable to the penalty; but that he was himself prevented by the forms of the House from bringing an action in his own name" a complete mistake I may observe in passing "and therefore he must find some one who would bring it. On the day in June I speak of Mr. Newdegate came in a great hurry: he said Bradlaugh had taken his seat and voted, and that the writ must be sealed and served at once."

So far is the evidence of Mr. Stuart, the solicitor.

Mr. Clarke, who was the plaintiff in the action which was brought against Mr. Bradlaugh for the penalty, was also called; and his evidence, so far as it is material to the present question, was as follows:—"I first heard of Bradlaugh having incurred the penalty some time in June, 1880. I happened to be at Mr. Stuart's on business, and I heard of it in conversation with him. I believe it was on that occasion that I gave my consent to the issue of the writ in my name. I don't know who asked me, but I don't deny that I was asked. I may have given my consent without being asked, but I do not say I did. I knew a writ entailed costs. I quite appreciated the consequences of this action. I never could have pretended to pay the costs in this action. I had no means whatever to pay the costs. I gave Mr. Stuart no undertaking to pay the costs. I gave him no written instructions. I think there was no discussion as to the payment of costs between me and Mr. Stuart. I said I must be indemnified against the payment of costs. I don't know whether I said this at the first interview or later in the day; but it must have been just after I consented to let my name be used as plaintiff. I should not have brought the action without the indemnity. Mr. Stuart must have said he would get me one. He may have mentioned Mr. Newdegate's name. Very likely he did mention from whom he was going to get the indemnity. Mr. Stuart was then acting for Mr. Newdegate to my knowledge. In the result I got the bond which has been read in court this morning. But for that bond I should certainly not have allowed the action to go on." So far Mr. Clarke.

The bond was before me; it was dated the 14th of July, 1880; and so far as is material was as follows. It declared Mr.

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Newdegate to be "held and firmly bound to the said Clarke in all sums of money, costs, charges, and expenses which the said Clarke has already paid or incurred, or is become liable to pay, or shall hereafter pay, incur, or become liable to pay in and about the prosecution of the said action or in anywise relating thereto, and which the sum or sums of money (if any) which may be recovered by or ordered to be paid to the said Clarke in the said action, either in respect of the penalty sued for in the said action or for costs, shall be insufficient to discharge, and whether such sum or sums of money, costs, charges, and expenses which shall be so paid or incurred by the said Clarke shall be paid or incurred by him or in his behalf in the prosecution of the said action, or shall be ordered to be paid by him to the defendant in the said action or otherwise." Such in its material substance is the bond.

A fact must now be added which, when the case was heard before me, might perhaps have been anticipated but had not happened; the reversal by the House of Lords of the judgment given against Mr. Bradlaugh by the Court of Appeal in the case of *Clarke* v. *Bradlaugh*. The House of Lords dismissed Mr. Clarke's action with costs, on the ground that he, according to the words of the Lord Chancellor, "has not any right to or interest in" the penalty he sued for. If he had not, it seems to follow that neither had Mr. Newdegate.

The action now before me is brought by Mr. Bradlaugh against Mr. Newdegate because he (I omit the vituperative adverbs) upheld and maintained the action on the part of Mr. Clarke against the now plaintiff Mr. Bradlaugh. Two questions arise—(1.) Will the action lie? (2.) If it will, what in the present state of things are the damages?

Mr. Newdegate was not called to deny or qualify the statements made by his own solicitor and by the person to whom he gave his bond of indemnity. It is proved that the action was in truth Mr. Newdegate's action; that Mr. Clarke was a man of straw, quite unable to pay costs which in case of failure must be heavy; that he never dreamed of paying costs; and that he never would have dreamed of bringing the action at all, if Mr. Newdegate had not put him forward and indemnified him against all consequences of bringing it. Mr. Newdegate's bond is no doubt

binding as between himself and Mr. Clarke, but it is only binding at Mr. Clarke's option, and if Mr. Clarke chooses to put it in suit. Mr. Bradlaugh's admission to the House of Commons, however, is a question in which a large number of persons have persuaded themselves that religion is involved; no one the least acquainted with human affairs but must have seen again and again the strange obliquities of which men, absolutely honourable in all other matters, will be guilty in what they think defence of what they think religion; and suppose Mr. Clarke, the man of straw, is content to become bankrupt and be ruined himself, while he half ruins Mr. Bradlaugh, what redress has Mr. Bradlaugh? He cannot himself sue on a bond to which he is no party, he cannot sue in Mr. Clarke's name nor compel Mr. Clarke to sue, for his benefit, in his own. It is probable, indeed, that by the agency of the Court of Bankruptcy this bond of Mr. Newdegate could be realized as an asset; and there are, I know, authorities which shew that, under certain circumstances, this could be done. But it would be a remedy troublesome and expensive and after all not absolutely certain. How the facts may turn out in the result it is, I think, immaterial to inquire. The first question is, will the action lie? and that must be determined by the legal relations existing between and the legal liabilities inter se of the parties to it. There are many definitions of maintenance, all seeming to express the same idea. Blackstone calls it "an officious intermeddling in a suit which no way belongs to one by maintaining or assisting either party with money or otherwise to prosecute or defend it": Bl. Comm. book iv. c. 10, s. 12. "Maintenance," says Lord Coke, "signifieth in law a taking in hand, bearing up, or upholding of a quarrel, or side, to the disdisturbance or hindrance of common right": Co. Litt. 368 b. These definitions are repeated in substance in Bacon's Abridgment, in Viner, and in Comyns, under the head of maintenance. To the same effect, though somewhat differing in words, is the language of Lord Coke in the 2nd Institute in his commentary on the Statute of Westminster the First, c. xxviii. There is, perhaps, the fullest and completest of all to be found in Termes de la Ley, "Maintenance is when any man gives or delivers to another that is plaintiff or defendant in any action any sum of money or

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other thing to maintain his plea, or takes great pains for him when he hath nothing therewith to do; then the party grieved shall have a writ against him called a writ of maintenance." Chancellor Kent, adopting Blackstone's definition, which definition itself is founded on a passage in Hawkins, says that it is "a principle common to the laws of all well governed countries that no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce": part vi. lect. 67. I quote from the excellent edition of Kent's Commentaries, published by Mr. O. W. Holmes at Boston in 1873. To the same effect is another American authority, Mr. Story. "Maintenance is the officious assistance by money or otherwise, proffered by a third person to either party to a suit, in which he himself has no legal interest, to enable them to prosecute or defend it": Story on Contract, ch. vii. s. 578. Jacob's Law Dictionary is to the same effect as the other authorities I have quoted.

I have been thus full in my citation of authorities, because I conceive it to be important to keep in view the original idea conveyed by the word in order to see whether modern authority has qualified or altered it, and to interpret the phraseology of modern decisions by principles which the judges who pronounced those decisions would undoubtedly have recognised. And it seems to me that, unless maintenance is to be struck out of digests and law dictionaries for the future, it is impossible to avoid the conclusion that Mr. Newdegate has been guilty of it. If this is to be done, it must be done by some higher authority. I have not the power, and, if I had, I have not the wish, to abolish an action which may be in some cases the only way of redressing very cruel wrongs. I do not in the least say that Mr. Newdegate deserves the stronger language in which Knight Bruce, L.J., describes what he calls "breed-bates and barretors," and which will be found by any one, who desires to combine amusement with instruction, and to read good law in racy language, in the judgment in *Reynell* v. *Sprye*. (1) But undoubtedly he drove on to sue Mr. Bradlaugh for a penalty, and he supported and maintained in involving Mr. Bradlaugh in protracted and expensive

(1) 1 D. M. & G. 656, 680.

litigation, a man who admitted he would never have brought the action but for Mr. Newdegate, who would never have gone on with it but for Mr. Newdegate's bond, and who could himself pay no costs if he failed in his action.

What is the state of the authorities on this subject? It is not useful to go very far back, because no doubt things were held to be maintenance some centuries ago which would not be held to be maintenance now. It may be that the danger of the oppression of poor men by rich men, through the means of legal proceedings, was great and pressing; so that the judges of those days, wisely according to the facts of those days, took strict views on the subject of maintenance. I do not pretend to the historical knowledge which would enable me to say with certainty whether or no this was so: at least it is very possible. But the earliest case to which I think it useful to refer is that of *Wallis* v. *Duke of Portland*. (1) That was decided by Lord Loughborough in 1797. He refused discovery to the plaintiff, on the express ground that, as it was sought to discover an agreement between the Duke of Portland and Mr. Tierney to join in the expenses of an election petition against the return of a Mr. Jackson, it was asking the Duke of Portland to discover what, if discovered, would be maintenance. The case was appealed to the House of Lords, and is to be found in the supplemental volume of Brown's Parliamentary Cases, p. 161. Lord Loughborough's decree was affirmed "principally," as the head-note states (in Brown the judgments do not appear at length), "on the ground that the transaction amounted to maintenance at the common law." Lord Loughborough and Lord Kenyon appear from the journals of the House of Lords to have been present in the House on this occasion. Lord Walsingham was also present; but I was in error on the argument in stating that he had been Chief Justice of the Common Pleas. Lord Chief Justice De Grey, the first Lord Walsingham, did not survive to 1798. For me, sitting at nisi prius and hearing a case on further consideration, this decision of Lord Loughborough affirmed in the House of Lords is a binding authority. In the Law Journal report, and in that only, of *Findon* v. *Parker* (2), to which I shall have presently to advert, Baron Rolfe, afterwards

(1) 3 Ves. 494. (2) 11 M. & W. 675; 12 L. J. (Ex.) 444.

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Lord Cranworth, is reported, and no doubt correctly reported, to have interjected the remark that the case of *Wallis* v. *Duke of Portland* (1) had been disapproved of. He does not say where or by whom. If he means by himself, his authority, though not without weight, can hardly, I should suppose, be compared to Lord Loughborough's; and as he was speaking only of the case in Vesey, and seems to have been unaware of the subsequent affirmance of Lord Loughborough's decree by the House of Lords, it is possible that, had be been aware of it, he would not have dismissed Lord Loughborough with such curt contempt. The interjected remark, I may observe, is not to be found in the report of the case in Meeson & Welsby. The cases of *Sprye* v. *Porter* (2) and *Stanley* v. *Jones* (3) were both of them instances of that head of maintenance which is called champerty, and are important chiefly as shewing that neither the Court of Common Pleas in the time of Tindal, C.J., nor the Queen's Bench in the time of Lord Campbell, considered maintenance to be obsolete or exploded.

The case of *Pechell* v. *Watson* (4) is more directly in point. In that case a count, which had been proved in fact, and which charged against the defendants conduct really indistinguishable from the conduct here charged and proved against Mr. Newdegate, was held a good count for maintenance by the Court of Exchequer, consisting of Parke, Alderson, Gurney, and Rolfe, BB. *Pechell* v. *Watson* (4) came to be considered in *Flight* v. *Leman*. (5) Its authority was recognised, but the latter case was decided against the plaintiff, who sued for maintenance, on the ground, I own I should have thought the narrow ground, that to instigate a suit was not maintenance, though to support one already instituted was. But the case of *Flight* v. *Leman* (5) is not in point, because the bond, which is the gravamen of the present plaintiff's complaint, was not given till nearly a month *after* the issuing of the writ and the commencement of the action. I notice in passing the cases of *Burke* v. *Greene* (6) where Lord Manners held that for one first cousin to advance to another sums of money for the recovery of an estate was, to use his words, "a case of clear and

(1) 3 Ves. 494.
(2) 6 E. & B. 58; 26 L. J. (Q.B.) 64.
(3) 7 Bing. 369.
(4) 8 M. & W. 691.
(5) 4 Q. B. 883.
(6) 2 Ball & Beatty, 517.

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distinct maintenance," and of *Harrington* v. *Long* (1), in which Sir John Leach, M.R., and Lord Brougham, upon appeal, held that, while the mere assignment of the subject of a suit was not maintenance, yet that it was maintenance to agree to give another the benefit of a suit on condition that he prosecutes it, and that it was properly discouraged because it promotes litigation and leads to oppression. These cases are both recognised in *Hutley* v. *Hutley* (2), which was indeed a case of champerty, but which is important as shewing that in 1873 Lord Blackburn, Lush, and Archibald, JJ., conceived the law of maintenance to be an existing law, and one which in a proper case they would enforce.

It results, I conceive, from all these cases, and the number might be largely increased, that to bind oneself after the commencement of a suit to pay the expenses of another in that suit, more especially if that other be a person himself of no means, and the suit be one which he cannot bring, is still, as it always was, maintenance; and that for such maintenance an action will lie. It is said, however, that this general statement requires two qualifications: first, that the acts of the maintainer must be immoral, and that the maintainer must have been actuated by a bad motive; next, that if he has, or believes himself to have, a common interest with the plaintiff in the result of the suit, his acts, which would otherwise be maintenance, cease to be so. For the first of these propositions a passage in the judgment of Sir John Coleridge, delivering the opinion of the Judicial Committee in *Fischer* v. *Kamala Naicker* (3), is cited; and for the second the judgments in *Findon* v. *Parker* (4), and the judgments, especially that of Archibald, J., in *Hutley* v. *Hutley*. (2) It is fit I should consider these authorities with the respect that is due to them and which I unfeignedly feel.

If the judgment of the Privy Council had the sense which has been contended for, I at least am not prepared to say that I should hold the conduct or the motives of Mr. Newdegate, as proved before me (and I know nothing but what is proved), to be such as, within the words of that judgment, taken even in the sense contended for, to relieve him from the character of a maintainer.

(1) 2 M. & K. 590.
(2) Law Rep. 8 Q. B. 112.
(3) 8 Moo. Ind. App. 170, 187.
(4) 11 M. & W. 675.

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But I am not obliged to give a positive opinion on this point, because I do not think the words can fairly bear the sense ascribed to them. The words are remarkable "it (i.e., maintenance), must be something against good policy and justice, something tending to promote unnecessary litigation, something that *in a legal sense* is immoral, and to the constitution of which a bad motive *in the same sense* is necessary." The decision of the House of Lords shews, I think, that Mr. Newdegate's conduct was against good policy and justice, and tended to promote unnecessary litigation—but what is immoral *in a legal sense?* What *in a legal sense* is a bad motive? It is not perhaps quite easy to say. Yet the language I am quoting is not the language only of the Privy Councillor who delivered judgment, and who, by the course of the Judicial Committee, is by no means certainly the writer of it, but of Lord Kingsdown, of Knight Bruce, L.J., Turner, L.J., Sir Edward Ryan, Sir Lawrence Peel, and Sir James Colvile, a collection of perhaps as great lawyers as in the year 1860 could have been brought together, and who must have intended something by a form of words not usual, and clearly intended to be definite and exact. At least in any view it must mean as much as this, that to do what is illegal is legally immoral, and that a motive which impels to an illegal act is legally a bad motive. In this sense I do not hesitate to call Mr. Newdegate's conduct immoral and his motive bad. The language used is obiter only, for the judgment is in an Indian case, holding that the Sudder Adawlut could not decide a case upon the ground of champerty which the pleadings did not raise, but that, if they could, the champerty or maintenance which would invalidate a contract in India must have the qualities attributed to champerty and maintenance by the English law, that is to say—and then follows the passage which I have quoted. Obiter dictum, however, or not, I entirely accept it, and intend to decide this case in accordance with its language.

This language was not, I think, intended to turn the Court and the jury into doctors of casuistry, or to embark them in inquiries as to the true character in a court of morals of the conduct or the motive. If the thing done is injurious and unlawful, and if none of those excuses exist which have been held

in law to justify the injury or render the act lawful, then the act is and remains unlawful and actionable; and further, as in the absence of evidence to the contrary men are held to intend to do what they do in fact, if the act is one from which in the nature of things injury must follow, the doer will be considered to have intended the injury he has done, and the existence of the mens rea will be inferred, so far at least as the inference is necessary to the maintenance of the action.

It is said, however, that the defendant had or believed that he had a common interest with Mr. Clarke in the result of the suit, and that, therefore, his finding Mr. Clarke the whole money for the litigation was not maintenance. As a general rule there is no doubt that such common interest, believed on reasonable grounds to exist, will make justifiable that which would otherwise be maintenance. The oldest authorities, authorities which hold a multitude of things to be maintenance which would not be held so now, all lay down this qualification. Brooke, Fitzherbert, Rolle, Hawkins, Viner, Comyns, to cite no more, all concur in this. Buller, J., in his celebrated judgment in *Master* v. *Miller* (1) strongly insists upon it. But then the instances they give shew the sort of interest which is intended. A master for a servant, or a servant for a master; an heir; a brother; a son-in-law; a brother-in-law; a fellow commoner defending rights of common; a landlord defending his tenant in a suit for tithes; a rich man giving money to a poor man out of charity to maintain a right which he would otherwise lose. But in all these cases the interest spoken of is an actual valuable interest in the result of the suit itself, either present, or contingent, or future, or the interest which consanguinity or affinity to the suitor give to the man who aids him, or the interest arising from the connection of the parties, e.g., as master and servant, or that which charity and compassion give a man in behalf of a poor man who, but for the aid of his rich helper, could not assert his rights, or would be oppressed and overborne in his endeavour to maintain them.

All this is recognized in the judgment of Lord Loughborough already referred to; and it is insisted upon with great force in the case of *Findon* v. *Parker* (2), a case which it is fit, from the reliance

(1) 4 T. R. 320. (2) 11 M. & W. 675.

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which has been placed upon it, that I should carefully examine. It was an action brought by an attorney for his bill of costs; it was brought against the person who had employed him to defend proceedings brought, against himself and a number of other landowners, by Jesus College, Oxford, to enforce payment of tithes for lands, which it was asserted by the defendant and his co-defendants were covered by a modus. The defendant pleaded that he, the defendant, had been guilty of maintenance in agreeing with other landowners to resist the claim of the college at their joint expense; and he insisted on his own wrong to escape the payment of his attorney's bill. No wonder that Lord Abinger said, "If any ground can fairly be suggested for making his contract legal, we ought to adopt it, in favour of the party who makes the defence, in order to acquit him of the imputation which he casts upon himself." No wonder that Baron Rolfe said, "The only hesitation I have had in this case has arisen from the fear, lest the indignation I feel against so unrighteous a defence as the present might lead one into bending the law more than ought to be done." The judges shew that there was abundant reason for the landowners to believe that they had a common ground for resisting, and a common interest in resisting, the claim of Jesus College; and they gave judgment for the plaintiff. In the course of Lord Abinger's judgment occurs the well-known passage on which so much stress was laid, and properly laid, in the argument. It has been read so often that I confine myself to referring to it at page 682. It is full of the strong sense characteristic of Lord Abinger, and I venture to adopt the language of Lord Blackburn in *Hutley* v. *Hutley* (1), and say that I incline to agree with and to adopt every word of it. But it has no application to the case before me; the interest in that case was an interest which the old law would have recognised, as Baron Rolfe expressly points out; and the case affords no ground for saying that the doctrine of maintenance in itself was either obsolete or exploded. Indeed Lord Abinger had expressly upheld it in *Prosser* v. *Edmonds* (2); and in *Shackell* v. *Rosier* (3), a case in many respects not unlike the present, the Court of Common Pleas refused to enforce a

(1) Law Rep. 8 Q. B. 112. (2) 1 Y. & C. 481.
(3) 2 Bing. N. C. 634.

contract of the same sort as that between Mr. Clarke and Mr. Newdegate on the ground that it amounted to maintenance. See particularly the judgments of Tindal, C.J., and Bosanquet, J. (1) What, then, is the common interest which existed here between Mr. Clarke and Mr. Newdegate? There is none, except the interest which all the Queen's subjects have in seeing that the law of the land is respected and the enactments of every Act of Parliament are obeyed. The doctrine of maintenance is not confined to civil actions, and, if this be legal, it will be legal to agree to pay the expenses of any one who will indict another for the misdemeanour of non-compliance with any Act of Parliament. The action here is brought for a penalty of 500*l.*, imposed by an Act passed in 1866 upon every member of the House of Peers and every member of the House of Commons, without distinction, who votes or sits during debate in either House without having made and subscribed the oath thereby appointed. In the case of a member of the House of Commons "his seat shall be vacated as if he were dead." In the case of a peer this consequence was, I presume, thought too severe, and it is omitted, and in this very parliament certain peers who had not complied with the provisions of the statute were relieved from all danger of the penalties by Acts of Indemnity. As to a member of the House of Commons, however, his seat is vacated by the operation of the Act, and the result of any action for the penalty can have no effect therefore upon the constitution of the House itself. The person contravening the Act has ceased to be a member; the action is for a penalty; the result of the action is the recovery or failure to recover 500*l.*; in that result it is not suggested that Mr. Newdegate had any interest, it was not argued that he was to share the penalty with the informer, and there is no other interest common to the informer and to him which is not common to him with every subject of the Queen. Indeed, if there had been a bargain, as certainly there was not, to share the penalty if recovered, it would have made the matter more illegal still. "Do you, a man of straw, sue another for a penalty; I will find all the money, and if you recover the penalty we will share it." Such a transaction is not only maintenance, but champerty, and, though I need cite no authorities to shew that it would be absolutely illegal, I will

(1) 2 Bing. N. C. 644, 649.

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mention only the great authority of Lord Eldon, who in his judgment in *Wood* v. *Downes* (1) expressly so decides.

It is true that this action is of the rarest; very few examples of it in any modern books are to be found. As a rule the doctrines and principles applicable to maintenance are discussed and laid down in judgments upon pleas, defences to actions of the more ordinary kinds, in which the defendant has sought to set aside a contract, or to be relieved from an obligation, on the ground that the contract was void or illegal, or the obligation not binding, because founded upon what was, or what savoured of, maintenance. But I think it has been shewn, not only from old abridgments and digests and text-writers, but by a chain of authorities from Lord Loughborough and Lord Eldon down to the present time, that the doctrine of maintenance is a living doctrine, and the action of maintenance is one which, in a fit case, the Courts of this day will support. The action of *Pechell* v. *Watson* (2), to which reference has already been made, was such an action. It was an action brought expressly on the ground of maintenance, and the plaintiff recovered large damages. It was tried in 1841, and, as might be expected from the date, many points of pure pleading were raised and decided in it which have not now the importance they had then. But it was not even contended that the action was misconceived; or that if properly stated, and stated by the proper parties, such an action would not lie. The case is an express authority in favour of this kind of action. It is my fortune to have to support it in an action in which the defendant is a man whose character is entitled to great and true respect, and in favour of a plaintiff with whose opinions, openly enough avowed, I have no kind of sympathy. Yet I will not call it an ill-fortune, for many of the most precious judgments which these Courts have ever heard pronounced have been pronounced in favour of persons who, if English justice could ever be swayed by personal feeling, or could for a moment "hedge aside from the direct forthright," would assuredly have failed to command success. It *is* an ill-fortune perhaps that to many men, though not to me, the cause of true religion seems to be concerned with the legal success or the legal defeat of a particular person, whose legal success or legal defeat is really to the cause of true

(1) 18 Ves. 120. (2) 8 M. & W. 691.

religion a matter of supreme indifference, yet in regard to whom (I speak only of what has been proved before me) recourse has been had to proceedings which, with regard to any other accused person, would have been sternly and universally condemned, and of which unhappily in the minds of many men the cause of true religion is burdened with the discredit. My duty, however, is very simple; to decide the case according to the best opinion I can form of the law which I am sitting to dispense, a duty which the elements of Christian teaching make, if not pleasant, at least plain and clear.

Having decided, therefore, as I do, that the action lies, what are the damages? In the argument it was rather assumed that the House of Lords would affirm the judgment of the Court of Appeal, and on that assumption it was conceded that if there were any damages they must be the penalty and all the costs which Mr. Bradlaugh had been put to in resisting its recovery. The House of Lords has relieved him of the penalty and of the party and party costs of the proceedings. But that leaves, I suppose, a considerable sum of money which the conduct of Mr. Newdegate has compelled him to pay, but which under the rules as to costs he cannot recover from Mr. Clarke. I assume that either Mr. Newdegate will pay without trouble, or that in the way I have pointed out he can be compelled to pay by the Court of Bankruptcy all that Mr. Clarke could be made to pay as costs. For the residue; the costs and expenses to which Mr. Bradlaugh has been put; his own costs as between solicitor and client, and any legal expenses which he has had to bear; for all this I think Mr. Newdegate is liable in damages. I think Mr. Bradlaugh is entitled to an indemnity at Mr. Newdegate's hands for everything which Mr. Newdegate's maintenance of Mr. Clarke has caused him. If this cannot, and probably it cannot, be agreed between the parties, it must go to an official referee to ascertain the amount, and on receipt of his report to me I will give judgment for the amount which he finds to be due, applying to his inquiry the principle I have laid down.

Judgment accordingly.

Solicitors for plaintiff: *Lewis & Lewis.*
Solicitors for defendant: *Stuart & Toll.*

E. L.

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March 21.

THE ATTORNEY-GENERAL *v.* DARDIER.

Revenue—Legacy Duty—36 Geo. 3, c. 52, ss. 6, 22—Executor, Valuation of Property by—"Property which shall not be reduced into Money."

By 36 Geo. 3, c. 52, s. 6, legacy duty shall be paid by the person taking the burden of the execution of the will upon delivery or payment of the residue of any personal estate to the person entitled, and by s. 22, where the residue shall consist of "property which shall not be reduced into money," the executor may set a value thereon, and the Commissioners of Inland Revenue may accept duty upon that value. Shortly after the death of a testatrix her executor brought in to the Inland Revenue Office the residuary account of her property, in which a value was set upon certain pictures and other personal property not reduced into money, and the Commissioners accepted duty upon that value. Subsequently—the residuary legatee and the executor having always intended that the pictures should be sold in the course of the administration—the executor sold them for a sum greatly in excess of the value upon which duty had been paid, and accounted to the residuary legatee for the proceeds:—

Held, that the provisions of s. 22 apply to property which shall not be reduced into money during the course of the administration by the executor, and not merely to property which shall not have been reduced into money when the residuary account is brought in; that the pictures, &c., therefore did not satisfy the description in s. 22, and that the Crown were entitled to duty under s. 6 upon the amount paid to the legatee.

INFORMATION by the Attorney-General claiming legacy duty from the defendant.

The facts and arguments sufficiently appear in the judgment.

March 10. *Sir H. James, A.G., Sir F. Herschell, S.G.* (*Vaughan Hawkins*, with them), for the Crown.

Webster, Q.C., and *Lumley Smith, Q.C.* (*McSwinney*, with them), for the defendant.

Cur. adv. vult.

March 21. The judgment of the Court (Pollock and Huddlestone, BB., and North, J.) was delivered by

POLLOCK, B. This is an information filed by the Attorney-General against the defendant, Miss Dardier, claiming on behalf of the Crown legacy duty, payable by the defendant at the rate of 10 per cent. on the proceeds of the sale of pictures and effects which were left by one Harriet Bredel to the defendant.

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Harriet Bredel died on the 3rd of December, 1874, having by her will, dated the 19th of February, 1870, appointed as executors and trustees W. Barber and C. Cancellor, and bequeathed to them all her real and personal estate upon trust, after payment of her debts, to pay certain pecuniary legacies, and as to the residue in trust to transfer and pay the same to the defendant.

On the 17th of February, 1875, her executor, W. Barber, brought into the office of the Inland Revenue the residuary account of her property, wherein it was stated that the residue on which duty was chargeable was 37,932*l.* 19*s.* 2*d.* Among the items in the account was the sum of 2979*l.* 17*s.*, which was therein stated to be the value of certain furniture, plate, linen, china, books, pictures, and other personal property of Harriet Bredel not converted into money.

The material facts relating to the valuation of these chattels, as appears from the answer, the amended answer, and the affidavits which have been filed, are as follows: The chattels in question were in the house of Harriet Bredel, the testatrix, and shortly after her death, on the 15th of December, 1874, they were valued for the purpose of paying probate duty by W. Oughton, an auctioneer and valuer of experience and repute, at the sum of 2979*l.* 17*s.*, at which amount they were, upon the 17th of February, 1875, as already stated, returned by the executor in the residuary account brought in to the Commissioners as a portion of the personal estate not reduced into money.

It was intended from the first that this property should be sold forthwith by the executor, and immediately after the valuation by Oughton, W. Wood, a partner in the firm of Messrs. Christie, Manson, & Co. the auctioneers, was called in by the executor, with the knowledge and approval of the defendant, and by his advice the sale was postponed until the 29th of April and the 1st of May, 1875, upon which days the property was sold by Messrs. Christie, Manson, & Co. and realized prices amounting in the whole to 31,156*l.* 19*s.*, and after deducting expenses the net proceeds were paid to the executor and accounted for by him to the defendant.

Upon these facts it was contended on behalf of the Crown, first, that at the time when the residuary account was brought in by

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the executor, there was such a suppression of the true facts as would entitle the Crown to insist upon the valuation being re-opened and the legacy duty being paid upon the amount which the property actually realized; secondly, that apart from this the Crown was entitled to the payment of legacy duty, based on the larger amount, upon the true construction of the statute which creates the liability.

With regard to the first of these contentions, we do not think the case is one in which it can be said that an advantage was gained or sought by or for the defendant by any fraud or improper suppression of the truth, and, seeing the conclusion at which we have arrived with regard to the second contention on the part of the Crown, it is not necessary to say more upon this part of the case than that we do not doubt for a moment that the defendant and her advisers acted with good faith in what they did.

With regard to the second contention, which depends upon the true construction to be put upon the statute, the question stands thus: the statute by which the legacy duty in question becomes payable is 36 Geo. 3, c. 52, and the sections bearing upon the present question are ss. 6 and 22. By s. 6 the duties imposed are to be paid by the persons taking the burden of the execution of the will upon delivery, payment, or other satisfaction, of any legacy, or of the residue of any personal estate to which any other person shall be entitled, and if any legacies are paid without deducting the duty it becomes a debt from the executor who has made any delivery or payment, and also from the person to whom the same is made. By s. 22, "In cases of specific legacies, and where the residue of any personal estate shall consist of property which shall not be reduced into money," the executor, or the person by whom the duty ought to be paid, may set a value thereon and offer to pay the duty according to such value, or may require the Commissioners to appoint a person to set a value, and the Commissioners may accept the duty offered upon the value set by the executors, or by the person by whom the duty is payable, without such appraisement if they think fit. If the Commissioners are not satisfied with the value so set they may appoint a person to appraise the effects and set a value, and assess the duty upon such value. Further, if the person by whom the

duty is payable is not satisfied with the valuation made under the authority of the Commissioners, he may cause the valuation so made to be reviewed by the Commissioners of Land Tax, who may appoint a person to appraise the effects and set a value thereon, and hear and determine the appeal. Upon this section it was argued for the defendant that the Commissioners, having received without objection the valuation put upon the goods in question by the valuer appointed by the executor, and not having availed themselves of the means of further valuation provided, were bound by such valuation and could not now seek to surcharge the defendant by reason of the goods having been sold for a larger amount. If the circumstances of the case brought it within the provisions of s. 22 we think that this contention would be correct; but in our judgment, when the whole facts of the case are taken into consideration, it cannot be truly affirmed that the goods in question were at the time of the valuation goods which came within the words of the section as being "property which shall not be reduced into money." These words appear to us to be used as distinguishing property which is, or is intended to be, specifically retained by the executor for the purpose of being handed over to the legatee (when the executor's duties with respect to it have come to an end) from property which is, or is intended to be, sold in the course of administration and in the performance of the executor's duties and the proceeds thereof accounted for to the legatee.

We read those words as meaning "which shall not be reduced into money during the administration," whereas the contention of the defendant would read them as though they had been written, "which shall not *have been* reduced into money when the account is carried in." Sect. 6 speaks of the duty as being payable upon the delivery, payment, or other satisfaction, of any legacy or of the residue of any personal estate, and s. 22 merely creates a machinery whereby the valuation of such legacy or residue may be conveniently made. Now in the present case it is obvious that from the date when Mr. Wood was first called in, which was long before the residuary account was brought in, down to the sale by Messrs. Christie, Manson, & Co., the intention of the executor and of the defendant, the legatee, was not that

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the property in question should be retained by the executor and handed over to the legatee in specie, but that it should be sold and the proceeds thereof accounted for in money, and the fact that, during the interval which elapsed between the valuation and the sale, the officers of the Inland Revenue in ignorance of the real facts accepted such valuation ought not to affect the rights of the Crown. In fact the officers of the Crown were put off their guard, and were misled by the express statement in the residuary account that the executor "intended to retain these articles for the use of the legatee." This was not the fact; though as before mentioned we acquit the defendant and her advisers of any intention to misrepresent the truth or to deceive.

It appears to us, therefore, unnecessary to consider how or under what circumstances the property in question came to be sold rather than retained by the executor, and that the true mode of treating the case is to consider the return and payment made by the executor as insufficient, and as if it had been made under a mistake common to the executor and to the Commissioners, and that, when that mistake is discovered and the real facts are known, the Commissioners are entitled to have the full amount of duty paid, based upon the actual proceeds of the property when sold, and that our judgment should be for the Crown with costs.

Judgment for the Crown.

Solicitor for the Crown: *The Solicitor of Inland Revenue.*
Solicitor for defendant: *F. L. Soames.*

W. A.

FERENS AND ANOTHER, APPELLANTS; O'BRIEN, RESPONDENT. 1883 April 24.

Criminal Law—Larceny—Water stored in Pipes, whether the subject of Larceny at Common Law.

Water supplied by a water company to a consumer, and standing in his pipes, may be the subject of a larceny at common law.

CASE stated by justices under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49.

At the hearing of an information before two justices of the county of Durham, charging the respondent with having feloniously stolen, taken and carried away two buckets of water, the property of the appellants, and of the value of 1*d.*, it was proved that the appellants were the owners of a colliery in the county of Durham, which was supplied with water by the Weardale and Shildon Water Company, Limited; that the colliery being out of the district in which the water company were authorized to supply water by their Act of Parliament, a meter was placed upon the water company's ground, and the water was brought from the meter to the colliery by means of underground pipes laid down by the appellants; that the water was then supplied to houses occupied by the appellants' workmen by means of branch pipes to which taps were attached, the workmen being allowed to take water from the taps on payment of a fixed price, and that the respondent was seen to take the water in question from one of the taps without having agreed to pay for the same.

The respondent having pleaded "not guilty," and desired to be dealt with summarily, the justices declined to convict her of the offence charged.

The question of law for the opinion of the Court was whether or not water could be the subject of larceny at common law.

E. Ridley, for the appellants, was not required to argue.

Granger, for the justices, contended that water could not be the subject of larceny at common law, and that this contention was supported by the fact that the legislature had thought it necessary to impose statutory penalties for the taking of water from

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pipes belonging to water companies by 10 & 11 Vict. c. 17, s. 59, amended by 26 & 27 Vict. c. 93, s. 16.

The COURT (Field, and Mathew, JJ.), were of opinion that water, under the circumstances and in the condition described in the case, could be the subject of a larceny at common law, and they directed the case to be remitted to the justices with a statement of this opinion.

Case remitted.

Solicitors for appellants: *Shum, Crossman, & Co., for W. H. Oliver, Durham.*

Solicitor for justices: *C. J. Inglis.*

W. A.

April 25.

GIBBS AND OTHERS *v.* THE GREAT WESTERN RAILWAY COMPANY.

Master and Servant—Negligence—Common Employment—Employers' Liability Act, 1880 (43 & 44 *Vict. c.* 42), *s.* 1 *sub-s.* 5—*Railway Company—Person having "charge or control" of Points.*

In an action for compensation under the Employers' Liability Act, 1880, the evidence shewed that it was the duty of F., a workman employed in the signal department of the defendants' railway, to clean, oil, and adjust the points and wires of the locking apparatus at various places along a portion of the line, and to do slight repairs; that for these purposes he was, with several other men, subject to the orders of an inspector in the same department, who was responsible for the points and locking gear, which were moved and worked by men in the signal boxes, being kept in proper condition; and that F., having taken the cover off some points and locking gear in order to oil them, negligently left it projecting over the metals of the line, whereby injury was caused to a fellow workman:—

Held, that there was no evidence for the jury that F. had "charge or control" of the points within the meaning of s. 1, sub-s. 5, of the Employers' Liability Act, 1880, so as to make the defendants liable for his negligence.

Affirmed on appl. 16 Q.B.D. 493; 12 Ch.

ACTION in the Marylebone county court by the widow and infant children of George Gibbs to recover, under the Employers' Liability Act, 1880, and 9 & 10 Vict. c. 93, compensation in respect of personal injury resulting in death sustained by Gibbs whilst in the defendants' employment.

The material facts appearing on the judge's notes were as follows:—

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Gibbs was employed by the defendants to drive an engine and train belonging to them, and whilst so employed the engine left the line of rails near Wolverhampton station by reason of the wooden cover of a certain locking apparatus and points having been left projecting over the metals, and he jumped or was thrown from the engine, and was killed.

The cover had been negligently left on the metals by one Fisher, who had taken it off in order to oil the points and wires in the locking apparatus. Fisher's evidence with respect to his employment and duties was as follows:—"I am employed by the company in the signal department, and have charge of the locking apparatus. A youth was working under me. My duty is to clean, oil, and adjust the points and wires, and to keep them oiled, and to see that the boy does his work. I had several places to go to. I worked under inspector Saunders. I am at the works every day."

Saunders gave the following evidence:—"I am inspector in the signal department of the Great Western Railway Company. Fisher is one of my men. His duties are to clean and oil all in connection with the locking gear at twelve places on six or seven miles of line. He has no control over the points; they are worked from the signal box. He had to do slight repairs. I should go over the work every week—sometimes every day—to see that he did his duty."

The judge left to the jury whether Fisher was a person having the charge or control of the locking apparatus, and whether he was guilty of negligence which caused the death of Gibbs.

The jury gave a verdict for the plaintiffs for the amount claimed.

The defendants obtained a rule calling on the plaintiffs to shew cause why the verdict should not be set aside, and a nonsuit entered, on the ground that there was no evidence of liability on the part of the defendants under the Employers' Liability Act, 1880.

Petheram, Q.C. (*T. L. Wilkinson*, with him), shewed cause. There was evidence for the jury that Fisher had "charge" of the locking apparatus and points within the meaning of s. 1, sub-s. 5

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of the Employers' Liability Act, 1880. The evidence on the judge's notes shews that it was Fisher's duty to clean and oil the machinery, and do slight repairs; he was therefore responsible for having it in an efficient condition, and in that sense had "charge" of it. It is admitted that he had not "control" over the points within the meaning of sub-s. 5.

Webster, Q.C. (*Wightman Wood*, with him), supported the rule. The Employers' Liability Act was passed in order to provide special protection for workmen, who before the Act could not in any case obtain compensation for injury sustained through the negligence of fellow workmen. But some limit must be placed upon the words "charge or control" in sub-s. 5. Having regard to the preceding sub-sections which deal with defects in the ways, works, &c., and negligence by persons having superintendence in the employment, it is submitted that when the legislature deals with railway servants in sub-s. 5, the negligence of persons having real charge or control of the points, &c., in the sense of being entrusted with the working or moving of them, is contemplated. Here Fisher was subject to the orders of Saunders, and was sent to do an individual piece of work in oiling the machinery, of which he could in no sense properly be said to have "charge." The negligence which caused the injury was in doing an independent act not necessarily connected with his employment of cleaning, oiling, and adjusting the points; he was therefore not guilty of the kind of negligence contemplated in sub-s. 5.

FIELD, J. I am of opinion that this rule must be made absolute. The action is brought by the widow and children of Gibbs, who met his death through Fisher's carelessness in leaving the cover on the line. If the action had been maintainable at common law, the negligence being undoubted, the defendants would have had no defence. But the action could not be maintained at common law as appears by the decision in *Priestly* v. *Fowler*. (1) The Employers' Liability Act was passed in order to remove what was felt to be the injustice to workmen produced by the ruling in that case, but the cases in which employers are made liable are very carefully limited by the five

(1) 3 M. & W. 1.

sub-sections of s. 1 of the Act. It is conceded that the injury was not caused by reason of any defect in the condition of the ways, works, machinery, or plant of the railway within sub-s. 1; nor was Fisher a person having "superintendence entrusted to him" within the meaning of sub-s. 2, because it was the duty of Saunders, the inspector, to see that all the points and wires were oiled, cleaned, &c., and he would probably be the person having superintendence within that sub-section. After having brought in "any defect in the condition of the ways, works, machinery, or plant," used in the business of the employer, and having also brought in persons exercising superintendence in the employment, and also persons entitled to give orders to which the workman at the time of the injury was bound to conform and did conform, the legislature by sub-s. 5 brings in a class of persons having a smaller area of superintendence, and deals with cases of injury caused "by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, points, locomotive engine, or train upon a railway." Now, certainly, there was a person in this case who had the "control" of the points. They are worked by the man in the signal-box by means of a highly complicated piece of mechanism; undoubtedly he had "control" over them under sub-s. 5. It is not suggested that Fisher had "control" over the points, but it is said that he had "charge" of them. What is the meaning of a person having the "charge or control" of the points? I doubt whether the words "charge" and "control" are intended to mean different things. If they are, and if the man in the signal-box was not the person in this case who had both charge and control of the points, possibly Saunders, the inspector, had charge, and the man in the signal-box had control. Fisher's position was this: It was Saunders' duty to see that the points were oiled, kept clean, and adjusted along a part of the line. He had several men under him, of whom Fisher was one, and each man had to visit and test different sets of points; see that they were in working order, and clean, oil, and adjust them at proper times. Can it be said that the man who taps the wheels of the carriages when a train stops at a station, or puts grease into the boxes of the axles,

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has "charge" of them. I doubt whether what Fisher did came to more than that. It is true that he could not oil and adjust these points without taking the lid off the box, and it may be that he would have had "control" over the box, if the legislature had thought fit to include the words "box or other moveable article" in sub-s. 5. That sub-section specifies signals, points, locomotives, &c., and whilst clearly pointing to persons in the common employment of a railway company—such as engine-drivers, firemen, gangers, pointsmen—provides that the common master shall be liable for the negligence of the particular persons who have charge—that is, who have the directing hand to carry out the general instructions of the master—with respect to the specified things. I am of opinion that there was no sufficient evidence upon which the jury could properly find that Fisher had charge of the points within the Act.

MATHEW, J. I am of the same opinion. I find a difficulty in ascertaining what was precisely meant by the general language used in sub-s. 5, but upon the best interpretation I can give I think the legislature had in contemplation the negligence of some person having charge or control of the points for the purposes of traffic and of movement. As Fisher did not answer that description, but was merely employed to oil, clean, and adjust that which was moved by some other thing in the charge and control of some other person, I am of opinion that there was no evidence to bring the case within the provisions of sub-s. 5, and therefore that this rule must be made absolute.

Rule absolute. Leave to appeal was given.

Solicitor for plaintiffs: *Elgood.*
Solicitor for defendants: *R. R. Nelson.*

W. A.

CHAPMAN *v.* BIGGS AND WIFE.
TYLER, GLYNN, AND ADAMS (GARNISHEES)
AND
ADAMS, FROST, AND HILLEARY (GARNISHEES).

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April 28.

Husband and Wife—Married Woman—Restraint on Anticipation—Attachment of Debts—Order XLV., r. 1.

Judgment having been signed in an action against the defendants, a man and his wife, it was sought to attach in execution moneys, in the hands of trustees forming part of the income of trust funds payable to the wife to her separate use, which had accrued since the judgment. The will by which the trust was created contained a clause restraining anticipation by the wife. It appeared that the action was for the amount of a promissory note made by the husband and wife jointly during the coverture:—

Held, that the moneys in question could not be attached in execution.

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APPEAL from the decision of Manisty, J., at chambers, rescinding two orders of a master attaching in execution sums of money in the hands of two sets of trustees.

The facts with regard to one of the orders were as follows:—The plaintiff had brought an action against the defendants, who were man and wife, for the amount of a promissory note made by the defendants jointly. The defendants made default in answering interrogatories in the action, and an order for judgment was in consequence made against them and judgment signed accordingly. The female defendant was entitled under the trusts of a will to the income of a certain share of residuary estate for her separate use, and the sum attached was a sum in the hands of the trustees of the will forming part of such income accrued since the judgment. The trust in favour of the female defendant was subject to a clause restraining anticipation. It appeared that the promissory note was made during the coverture.

The facts with regard to the other order were substantially similar, with the exception that it was stated that in that case the sum attached had not come to the hands of the trustees till two days after the making of the order nisi for attachment, though it was in the trustees' hands when the order was made absolute. But, as will be seen, the judgment made this distinction between the two cases immaterial.

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Paine, for the judgment creditor, in support of the appeal. These sums of money are in the hands of the trustees and immediately payable to the female defendant. While the judgment against the female defendant stands she cannot deny her liability for the judgment debt, and these sums of money being immediately payable can be attached to answer such debt as in any other case. Under these circumstances no question of anticipation arises.

[He cited *Nash* v. *Pease*. (1)]

Henderson, for the first set of garnishees, in support of the judge's order. The question is whether by the expedient of giving a promissory note and suffering judgment by default the restraint on anticipation can be evaded. It is clear that at the time when the note was given the female defendant could not bind this property by contract, inasmuch as that would be in contravention of the restraint on anticipation. The plaintiff is in this dilemma; if when the female defendant signed this note she did not affect to charge her separate estate, cadit quæstio: if she did affect to charge it, she had no power to do so. Whether the female defendant was a consenting party to the judgment is immaterial. To allow these orders to stand would be allowing her indirectly to do what she could not do directly.

[MATHEW, J. Does not the question really come to be whether this judgment, so far as the married woman is concerned, is such a judgment as is contemplated by the orders relating to attachment?]

There can be no judgment against a married woman personally in a case like the present. All that can be done is to charge her separate estate. The trustees may be joined in the action and then they will be bound, but if they are not joined then the judgment must be for an inquiry as to the existence of separate property chargeable. Neither of these courses has been adopted here. The existence of this judgment cannot prevent the Court, when a sum of money is sought to be attached in execution, from going into the question whether to attach such sum would be in contravention of the restraint of anticipation. *Pike* v. *Fitz-*

(1) 47 L. J. (Q.B.) 766.

gibbon (1) is directly in point to shew that this money cannot be attached.

Bray, who appeared in support of the judge's order on behalf of the second set of garnishees, was not called upon.

Paine, in reply. If it was now a question of setting aside the judgment against the female defendant it would be a different matter. But the judgment stands, and is presumably available against any property to which the female defendant is now entitled. She is entitled to this money not in the future but in the present.

[WATKIN WILLIAMS, J. But, when we find that there is a restraint of anticipation, it seems to me that, notwithstanding the judgment, we are bound to consider whether the effect of the attachment of this money would be to allow anticipation.]

It may be that the judgment is wrongly entered, but as entered it is just like a judgment against any other defendant, and it is contended that any money that would be attachable in the case of any other defendant would be attachable here.

WATKIN WILLIAMS, J. I am of opinion that this appeal should be dismissed. The matter has been so fully gone into during the argument that I think it unnecessary to state our reasons for so deciding at any length. It seems to me that, if this form of execution could be obtained under the circumstances of this case, the restraint on anticipation could always be evaded. It is admitted that at the time of giving the promissory note the female defendant could not legally charge the income of the trust fund to accrue due thereafter, but to allow this sum of money to be attached would in substance be allowing her to anticipate.

MATHEW, J. I am of the same opinion. I do not think this judgment, so far as it affects the female defendant, is such a judgment as was contemplated by Order XLV., rule 1. I think the judgment there contemplated is one that is available against the defendant for all purposes. Here the judgment as against the married woman is not so available. I also agree that it is a sufficient reason for dismissing this appeal that, if the orders of

(1) 17 Ch. D. 454.

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the master were allowed to stand, it would in substance be allowing the female defendant to anticipate, notwithstanding the restraint of anticipation.

Appeal dismissed.

Solicitor for plaintiff: *Robert Chapman.*

Solicitors for garnishees: *Henderson, Glynes & Son; Hilleary & Taylor.*

E. L.

Feb. 22.

[IN THE COURT OF APPEAL.]

THE NORTH LONDON RAILWAY COMPANY *v.* THE GREAT NORTHERN RAILWAY COMPANY.

Arbitration—Injunction to restrain proceeding with Arbitration—Jurisdiction—Judicature Act, 1873, *s.* 25, *sub-s.* 8.

The Judicature Act, 1873, s. 25, sub-s. 8, has given no power to the High Court to issue an injunction in a case in which no Court before that Act had power to give any remedy whatever.

Therefore the High Court has no jurisdiction to issue an injunction to restrain a party from proceeding with an arbitration in a matter beyond the agreement to refer, although such arbitration proceeding may be futile and vexatious:—

Semble, per Brett, L.J., that the Judicature Act, 1873, has dealt only with procedure, and not with jurisdiction at all, and that if no Court had power to issue an injunction before that Act, the High Court has no such power now.

THE defendants, the Great Northern Railway Company, made a junction line of railway between their main line at Finsbury Park and the railway of the plaintiffs, the North London Railway Company, at Canonbury, and on the 1st of February, 1875, an agreement was entered into between the two railway companies "to provide for the working of the suburban passenger traffic from the Great Northern station over the Finsbury Park junction line to Broad Street and intermediate stations, and also for the better exchange of traffic" between the two companies. This agreement contained a clause which was as follows: "Any question or difference arising under this agreement shall be referred to arbitration pursuant to the Railway Companies Arbitration Act, 1859."

On the 10th of December, 1881, a collision occurred on the said junction line between several trains of the plaintiffs, owing

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to the negligence of a signalman, and in consequence of such collision the plaintiffs' engines and carriages were broken and damaged, and several passengers were killed and seriously injured, and amongst them were passengers whom the defendants had contracted to carry to stations on the plaintiffs' line of railway. Claims for compensation having been made against the defendants by or on behalf of such passengers, the defendants insisted that the plaintiffs were liable to contribute the whole or a portion of the costs of settling such claims. The plaintiffs repudiated their liability, and claimed compensation from the defendants. Each party imputed the cause of the accident to the negligence of the servants of the other. Under these circumstances, on the 13th of June, 1882, the defendants, by an instrument under their seal, reciting the agreement of February, 1875, and that differences had arisen under it, appointed an arbitrator on their behalf, and gave notice of such appointment to the plaintiffs, who denied that any differences had arisen under the said agreement, but, nevertheless, under protest, appointed an arbitrator to act for them in the matter. The arbitrators so appointed being unable to agree upon an umpire, the Board of Trade, on the 23rd of August, 1882, appointed an umpire, but without prejudice to the protest of the plaintiffs against any appointment being made. In the meantime, namely, on the 28th of June, 1882, this action was commenced to recover damages for injury to the rolling-stock of the plaintiffs, in consequence of the above-mentioned collision. The defendants pleaded a counter-claim in which they alleged that the collision was occasioned by the negligent and improper conduct of the plaintiffs' servants in the management of their signals at the Canonbury junction signal-box, and they claimed a large sum of money as damages or an indemnity against claims for compensation to the defendants' passengers who were being carried in the plaintiffs' trains at the time of the collision.

Afterwards, on the 17th of November, 1882, on the application of the plaintiffs, the Queen's Bench Division (consisting of Field and Stephen, JJ.) made an order restraining the defendants from proceeding with the said arbitration. This order was made on the ground that no question or differences had arisen under the agreement of the 1st of February, 1875, it not being disputed on

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the part of the defendants that the Court had jurisdiction to make the order.

The defendants appealed.

R. T. Reid, Q.C. (*Cyril Dodd*, with him), for the defendants.

[BRETT, L.J. What jurisdiction is there in the Queen's Bench Division or in this Court to restrain parties by injunction from proceeding with a reference, on the ground that the arbitrator has no jurisdiction to hear and determine the case?]

None. There have been cases in which an arbitrator has been restrained from proceeding where he has been guilty of misconduct: *Pickering* v. *Cape Town Ry. Co.* (1) and *Beddow* v. *Beddow*. (2) If the arbitrators have no jurisdiction, the want of it would be a good answer to an action on the award. It is not consistent with the existence of such defence that there should be a right to an injunction to stay the arbitrators from proceeding. Next, if the Court had jurisdiction there was no ground for the exercise of it in this case.

[He was then stopped, the Court desiring the question of jurisdiction to be first argued.]

Rigby, Q.C., and *T. T. Paine*, for the plaintiffs. The Court ought to determine whether there is a right under the agreement of February, 1875, to refer this matter of dispute and not put the plaintiffs to the risk which they would otherwise incur if they were compelled to judge for themselves whether the matter came or not within that agreement. Since the Judicature Act, 1873, at least, there is jurisdiction to grant an injunction to restrain arbitration proceedings, for very extensive powers in that respect are conferred by that Act: s. 25, sub-s. 8, enacting "a mandamus or an injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made."

[COTTON, L.J. That only refers to interlocutory orders.]

Yes; but as said in Wilson's Judicature Acts, 3rd ed. p. 30, "whatever relief can be granted by interlocutory order under this section can of course be granted by a final order at the trial."

(1) Law Rep. 1 Eq. 84. (2) 9 Ch. D. 89.

[COTTON, L.J. That is true; but when the section refers to interlocutory orders only, it is not likely that it intended to confer a right which did not previously exist.]

In *Beddow* v. *Beddow* (1) Jessel, M.R., after referring to the Judicature Acts, said: "I have unlimited power to grant an injunction in any case where it would be right or just to do so; and what is right or just must be decided, not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles."

[COTTON, L.J. Is there any authority for saying that the High Court will grant an injunction where no wrong legal or equitable has been done by the party sought to be restrained, and is there any such wrong done here? could an action be maintained for going on with an arbitration which would be futile and useless?]

In *Malmesbury Ry. Co.* v. *Budd* (2) an order was made to restrain an arbitrator from proceeding with the reference. "On the question of jurisdiction," said Jessel, M.R., "I think the Court must have jurisdiction to grant an injunction in such a case as this. It stands in this way: no doubt there is jurisdiction in the Court to set aside an award on the ground of corruption in the arbitrator, but if corruption is proved beforehand so that the arbitrator is unfit to sit, it appears to me that by analogy to the writ of prohibition, which goes to inferior courts to prevent a judge who is incompetent to decide from deciding the case, there must be a similar jurisdiction to prevent the throwing away of the expense and trouble, to say nothing of the delay, involved in going on with an arbitration before an arbitrator who has no power of deciding the case. I should not therefore assume jurisdiction at all. I should be simply carrying out the well known jurisdiction formerly exercised by the Courts of Equity, but which is now transferred to the High Court, to restrain that from being done which if done could do no good to anybody, but would cause an immense amount of mischief in the shape of delay, expense, and trouble."

[COTTON, L.J. In *Pennell* v. *Roy* (3), where an injunction was refused to restrain an action in Scotland by a creditor who

(1) 9 Ch. D. 89. (2) 2 Ch. D. 113.

(3) 3 D. M. & G. 126.

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had not proved under a bankruptcy in England against the bankrupt's assignees, Turner, L.J., at p. 139, says, "If we were to maintain this injunction we should, as it seems to me, be assuming a jurisdiction in this Court to prescribe the courts in which parties should bring their suits without there being anything to affect the consciences of the parties, upon the simple ground that the suits were such as in the opinion of this Court ought not to be maintained, and thus we should be bringing under the decision of this Court the question whether suits in other Courts could be maintained—a question which it is for those Courts and not for this Court to determine."]

In *Aslatt* v *Corporation of Southampton* (1), Jessel, M.R., was of opinion that the Judicature Act, 1873, s. 25, subs. 8, had given the Court a power to interfere by injunction which it did not possess before that Act. In that case an injunction was granted to restrain the corporation from declaring void the office of alderman of the borough which was held by the plaintiff, or from interfering with the plaintiff's exercise of his rights of alderman, and no injunction of that nature, or in aid of a man in possession of an office, had ever been granted before. *Hedley* v. *Bates* (2) was also a case in which an injunction was granted, viz., to restrain a party from taking proceedings before the magistrates under the Land Drainage Act, 1861 (24 & 25 Vict. c. 133), where before the Judicature Act no injunction would have been granted.

[BRETT, L.J. But the Court had power to grant prohibition.]

That case of *Hedley* v. *Bates* (2) is explained by Jessel, M.R., in *Stannard* v. *Vestry of St. Giles, Camberwell* (3), where he says, "The magistrates there had no jurisdiction unless a certain notice was given, and the real question I had to decide was whether a valid notice had been given or could be given, and then it was said that that question must be decided by the magistrates when the case should come before them, which it must, and the answer was 'that may be so; but where the whole matter is before the Court in the first instance, and the Court has power to decide whether the magistrates had jurisdiction, it is much more convenient

(1) 16 Ch. D. 143. (2) 13 Ch. D. 498.
(3) 20 Ch. D. 190, at p. 196.

instead of granting a prohibition to grant an injunction between the same parties.'"

R. T. Reid, Q.C., in reply cited *Day* v. *Brownrigg* (1) and *Gaskin* v. *Balls.* (2)

BRETT, L.J. In this case the appellants insisted that they had a right to go to arbitration under an arbitration clause in an agreement between the two companies, and so insisting they appointed an arbitrator. The respondents, under protest, also appointed an arbitrator, and those arbitrators not agreeing, the Board of Trade appointed an umpire. After the commencement of the arbitration the respondents brought this action against the appellants who have therein delivered a counter-claim in respect of the very matter which they themselves insisted should be referred to arbitration. Under those circumstances the respondents applied to the Queen's Bench Division for an injunction to restrain the appellants from proceeding further with the arbitration, and the Divisional Court having granted that injunction this appeal has been brought. The respondents contend that they have a right to maintain that injunction because they say it is clear that the subject-matter of dispute is not one within the arbitration clause in the agreement, and that therefore the arbitrators have no jurisdiction to proceed so as to bind the respondents, and if the arbitration is allowed to proceed the proceedings will be futile and vexatious and cause delay. On the other side it is said that if the subject-matter of arbitration is beyond the jurisdiction of the arbitrators, then the respondents may stay away, and then, though it may be true that the arbitration will be futile, it will do no injury to the respondents and put them to no expense, nor stop them from proceeding in due course with the present action, and if it be vexatious it is not a vexation of which the law can take notice. The question is whether under those circumstances the Court can issue an injunction. Now the cases before the Judicature Act would seem to shew that no Court would have issued an injunction in a case where if the thing went on there would be no legal injury. It is obvious, as it seems to me, that where, as it is here assumed, the

(1) 10 Ch. D. 294. (2) 13 Ch. D. 324.

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whole matter is beyond the jurisdiction of the arbitrators, the fact of the appellants going on with that futile arbitration is no legal injury. Suppose an award was made the respondents could not bring an action on that account against the appellants. It would not be a cause of action known to the law. If they could not bring an action for it after the award they certainly could not bring an action before the award. Therefore it seems to me that before the Judicature Act neither the Court of Chancery nor any Common Law Court would have had any jurisdiction to issue an injunction to enjoin the appellants from proceeding with this futile arbitration, and I doubt whether under the circumstances of this case any Court before the Judicature Act would have had any right to put the appellants to an election.

It is said, however, nevertheless, that by reason of sub-s. 8 of s. 25 of the Judicature Act, 1873, the Court can now issue an injunction, and that it ought to do so; and it is stated that there are decisions by the Master of the Rolls to the effect that sub-s. 8 of s. 25 of the Judicature Act of 1873, has enlarged the jurisdiction of the Court in the matter of injunctions so as to give any judge of the High Court power to issue an injunction in cases in which before the Judicature Act no Court could have issued an injunction or have given any remedy whatever. It is not necessary to determine now whether this sub-s. 8 has given power to issue an injunction in cases where no Court could have issued an injunction before the Judicature Act, as it is only necessary for the present case to decide whether that sub-section gives power to a judge of the High Court to issue an injunction in a case where no Court before the Judicature Act could have given any remedy whatever. I personally have a very strong opinion that the Judicature Act has not dealt with jurisdiction at all, but only with procedure; that it has given to the one Division the procedure of the other Division, or to the two Divisions reciprocally the procedure of the other Division, and that in some cases it has amended the procedure of both Divisions, but that it has not given to any Court a jurisdiction which no Court had before. Individually I should be inclined to hold that if no Court had the power of issuing an injunction before the Judicature Act, no part of the High Court has power to issue such an injunction

now; but it is not necessary now to decide that. No case, however, has I think gone beyond what my own views on the subject are, unless it be the case of *Aslatt* v. *Corporation of Southampton* (1), where apparently an injunction was granted in a case in which no Court before the Judicature Act would have granted an injunction; but it is not a case in which before the Judicature Act no Court would have given any remedy, because obviously before that Act there was a remedy by a quo warranto. In the case of *Malmesbury Ry. Co.* v. *Budd* (2) the Master of the Rolls issued an injunction, but it was on the ground that the arbitrator had been guilty of corruption. And in *Beddow* v. *Beddow* (3) the Master of the Rolls also issued an injunction, but that was on the ground that the arbitrator had been guilty of misconduct; the misconduct in that case being that the arbitrator, after he had assumed his authority as arbitrator, had become indebted to one of the suitors without the knowledge of the other side. Therefore in both those two last cases before the Judicature Act the common law Courts would certainly have removed those arbitrators and so prevented them from proceeding with the arbitration, and it seems to me that what the Master of the Rolls practically did was the same, namely, to remove the arbitrator in each of those cases. Now I will not enter upon the case of *Hedley* v. *Bates* (4), because it is one about which there has been considerable discussion, and it is one about which the Master of the Rolls himself has said that he did not think he had so expressed himself as to make what he intended as clear as almost all his judgments are. Therefore the only case which goes beyond my own personal inclination as to the construction of this section is the case of *Aslatt* v. *Corporation of Southampton* (1); and I doubt whether that case is rightly decided: but it is not necessary now to determine this. It seems to me that the dicta of James, L.J., and Thesiger, L.J., in *Day* v. *Brownrigg* (5) and *Gaskin* v. *Balls* (6) are quite sufficient if authority were wanted for what we are now deciding. It seems to me that the words "just or convenient" do not increase the power of any part of the High

(1) 16 Ch. D. 143.
(2) 2 Ch. D. 113.
(3) 9 Ch. D. 89.
(4) 13 Ch. D. 498.
(5) 10 Ch. D. 294.
(6) 13 Ch. D. 324.

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Court to the extent of altering the rights of parties so as to give to either a right which did not exist in law at all before the Judicature Act. Therefore in my opinion there is nothing in the Judicature Act which enables any part of the High Court to issue an injunction in a case in which before the Judicature Act there was no legal right on the one side or no legal liability on the other at law or in equity. If we were to attempt to stop the appellants here from proceeding with this arbitration it seems to me that we should be putting upon them a burden, and that we should be giving to the respondents a right, neither of which existed in equity or at common law before this statute. What we are asked to do is to take away from the appellants their power of election, if there be any, and to enjoin them against proceeding at their own risk, and at their own expense, without injury to anybody in what, for the purpose of this judgment, we must assume to be an entirely futile arbitration, which would not injure any one but the appellants. Therefore it seems to me that the injunction which is now appealed against cannot be sustained, and that this appeal ought to be allowed.

COTTON, L.J. In this case the Divisional Court granted an injunction to restrain the Great Northern Railway Company from proceeding with a reference to arbitration which they had taken, as they allege, under a clause in the agreement between them and the respondents. The injunction was granted on this ground, that in the opinion of the Divisional Court it was a matter beyond the agreement to refer, and therefore it was not within the powers of the arbitrators. We desired the question to be argued first whether the Court had power to grant an injunction; and in my opinion it had not such power. I will assume that the Great Northern Railway Company are proceeding before a tribunal which has no jurisdiction to deal with the matter, but then can it be said that their doing so is any interference with any legal right of the plaintiffs, or is inflicting on the plaintiffs that which the law considers a wrong. Of course it is very inconvenient to anyone to be brought before a tribunal which has no jurisdiction, but does that give a right to the High Court to interfere? Undoubtedly it could hardly have been contended that in such a

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case before the Judicature Act any Court would have interfered by injunction to restrain a party from going on before an arbitrator. But the argument was that the Judicature Act, 1873, s. 25, sub-s. 8, had entirely altered the power of the Court in such matters; and that, looking to the words of that section, even where there was no legal right before capable of being enforced in any Court, this section had given the High Court power to interfere by way of injunction. Great reliance was placed upon the words, "An injunction may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made." If it was intended to give the enormously increased power which it is contended is given by this section, it is remarkable that it empowers it to be done by interlocutory order. It is said if it can be done by interlocutory order, of course it can be done by a final order at the hearing of the cause or judgment; no doubt that is true; but when the section only refers to interlocutory orders and not to orders for injunction to be made at the hearing of the cause, is not the primâ facie presumption that it did not intend to give the right to an injunction to parties who before had no legal right whatever, but simply to give to the Court, when dealing with legal rights which were under its jurisdiction independently of this section, power, if it should think it just or convenient, to superadd to what would have been previously the remedy, a remedy by way of injunction, altering therefore not in any way the rights of parties so as to give a right to those who had no legal right before, but enabling the Court to modify the principle on which it had previously proceeded in granting injunctions, so that where there is a legal right the Court may, without being hampered by its old rules, grant an injunction where it is just or convenient to do so for the purpose of protecting or asserting the legal rights of the parties. That, in my opinion, is the real meaning of this section. In my opinion, all that was done by this section was to give to the High Court power to give a remedy which formerly would not have been given in that particular case, but still only a remedy in defence of or to enforce rights which according to law were previously existing and capable of being enforced in some or one of the different Divisions

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which are now united in the High Court. It is very true that the High Court does possess jurisdiction in matters which some of the different Courts before did not possess, but then it is the Court which amalgamates in itself all the jurisdictions which had previously existed, and undoubtedly in that sense a new jurisdiction is given now to the Chancery Division in matters which were dealt with previously only by the Common Law Courts. In my opinion the sole intention of the section is this: that where there is a legal right which was, independently of the Act, capable of being enforced either at law or in equity, then, whatever may have been the previous practice, the High Court may interfere by injunction in protection of that right.

But undoubtedly one is bound to consider the cases which have been referred to in which it is said that a different interpretation had been put upon this section by the Master of the Rolls. In my opinion the Master of the Rolls does not in any one of them lay down any principle contrary to that which I have stated is the true principle of the Act. In *Beddow* v. *Beddow* (1) he granted an injunction to restrain an arbitrator from going on, and he uses there this language: "In my opinion, having regard to those two Acts of Parliament, I have unlimited power to grant an injunction in any case where it would be right or just to do so; and what is right or just must be decided, not by the caprice of the judge, but according to sufficient legal reasons or on settled legal principles." He means that if there is either a legal or an equitable right which is being interfered with, or which the Court is called upon to protect, and the circumstances do not render it inconvenient or unadvisable to interfere, but render it convenient and advisable to interfere, the Court may protect that right by giving the remedy which previously would not have been given, namely, an injunction, and in that case what he did was to interfere where an arbitrator was acting corruptly in the exercise of his jurisdiction under the reference. The case of *Aslatt* v. *Corporation of Southampton* (2) was also referred to. In that case I think the Master of the Rolls considered that the plaintiff had independently of the Judicature Act a legal right of action; and that therefore the Act enabled the Court in order to do complete

(1) 9 Ch. D. 89. (2) 16 Ch. D. 143.

justice to grant an injunction; for what the Master of the Rolls says there is this: "That being so, a further question is raised as to whether I ought to interfere by injunction. It is said, and I believe with perfect truth, that no such injunction was ever heard of formerly; and there was a very good reason for it, namely, that the Courts of Common Law which exercised jurisdiction over cases of this kind had no right to grant an injunction, because the Act enabling them to do so was not passed until a very recent date, and, therefore, you could not have an injunction so far as the common law was concerned; nor was it the habit of this Court of Chancery to grant an injunction in aid of a legal right where the man was in possession of an office." He assumes there that the plaintiff had a legal right and a remedy at law independently of the Act, and upon that ground he merely follows out what I think is the principle, that where there is independently of the Act a right which can be asserted either at law or in equity, then this section provides that where it is right in order to do effectual justice an injunction may be granted. Then came the cases of *Stannard* v. *Vestry of St. Giles, Camberwell* (1), and *Hedley* v. *Bates* (2), and in none of them does the Master of the Rolls, in my opinion, lay down any principle which interferes with what I think is the true construction of the Act. What he says there was that under the circumstances of those cases there was a right before the Judicature Act to apply to a Common Law Court for prohibition; and that being so, as the parties were there before him, instead of sending them to get the prohibition he granted them an injunction against the person who was seeking to go on before the wrong tribunal. In my opinion, therefore, the argument fails so far as it is founded on the Judicature Act, that though no legal right is interfered with by the party asking to go on before the arbitrator, who has no jurisdiction, yet the Court ought to grant an injunction, because it is convenient and just to do so in order to save expense. There is another matter with which I ought to deal. The Court of Chancery exercises its jurisdiction of putting parties to an election, and Mr. Rigby sought to apply that principle, and although he did not ask to put the defendants to their election, yet he sought to bring

(1) 20 Ch. D. 190. (2) 13 Ch. D. 498.

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the case within the principle on which the Court of Chancery interferes to prevent vexatious or unnecessary litigation. Can that principle be applied here? In my opinion, even if this were an undoubted case of election, I should say the proper course would be to put the party to his election, and not to do what has been done here; but I am not at all satisfied that this is a case for election. The reference to arbitration had been commenced first by the defendants, and although they counter-claimed in the action by the plaintiffs, yet that was in the nature of a defensive proceeding. It is no doubt in substance another action, but it introduces by way of defence a claim against the plaintiffs for damages in consequence of that which the plaintiffs make as their cause of action against the defendants, having been, as the defendants say, caused by the misconduct of the plaintiffs' servants for which the plaintiffs are answerable. I should hesitate to say that in such a case the defendants ought to be put to their election; and I cannot see that the defendants have brought themselves within the principle which entitles the Court to interfere upon the ground of vexatious litigation; because it is possible that this action may not go on, and then the defendants would wish to go on with the reference to arbitration, and not with the counter-claim, which although in form another action, yet is in reality a defence against the claim by the plaintiffs in this action. In my opinion, therefore, there is no ground for asking the Court to interfere by way of injunction, and this appeal must be allowed.

Appeal allowed.

Solicitors for plaintiffs: *Paines, Layton, & Pollock.*
Solicitors for defendants: *Nelson, Barr, & Nelson.*

W. P.

TOMPSON *v.* DASHWOOD. 1883

April 30.

Defamation—Privilege—Libel—Publication of Privileged Communication by Mistake—Negligence.

The defendant wrote defamatory statements of the plaintiff in a letter to W. under circumstances which made the publication of the letter to W. privileged, but by mistake the defendant placed it in an envelope directed to another person who received and read the letter. In an action for libel:—

Held, that the letter having been written to W. under circumstances which caused the legal implication of malice to be rebutted, the publication to the other person, though made through the negligence of the defendant, was privileged in the absence of malice in fact on his part.

ACTION for libel.

Statement of claim that the defendant falsely and maliciously wrote and published to the secretary and chairman of the Birmingham Vinegar Brewery Company and others, a letter therein set out, containing defamatory statements of and concerning the plaintiff, by reason whereof he sustained damage as therein mentioned.

Statement of defence (so far as material) that the expressions complained of were not written with the defamatory meaning alleged, or any other defamatory sense or meaning, and were not libellous per se; that the defendant did not write them or any of them maliciously; and that by reason of certain facts stated in the defence, the publication of the letter was privileged.

Issue was joined on the defence.

At the trial, before Cave, J., at the Warwick Winter Assizes, 1883, the following facts were proved in evidence or admitted:—The plaintiff was the managing director, with a salary, of the Birmingham Vinegar Brewery Company, Limited. The defendant was a director of the same company. On the 29th of November, 1882, the plaintiff and the defendant were about to make a journey to the continent upon the business and at the expense of the company, and upon that day the defendant wrote two letters. One of them (being the alleged libel) was written to Colonel Wood, the chairman of the company, and began "Dear Colonel Wood," and after stating that the plaintiff intended to start for the continent on the following night, suggested that the

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secretary's cash-book should be looked into in order to see what sums the plaintiff had charged against the company for travelling and other expenses, and that these sums were excessive, the innuendo alleged being that some of the expenses so charged had never really been incurred. The defendant wrote the other letter about a different matter to the secretary of the company, who was the plaintiffs' brother, and by a mistake the defendant put each letter into the envelope intended for the other, so that the letter written to Colonel Wood went to the plaintiff's brother, who read and made a copy of it, and handed the original over to the plaintiff.

The learned judge directed the jury that if they found that the letter written to the chairman was libellous, but was not written by the defendant maliciously or with an indirect motive, then it was privileged, and the verdict should be for the defendant. The jury gave a verdict for the defendant.

The plaintiff obtained a rule calling on the defendant to shew cause why there should not be a new trial, on the ground that the learned judge misdirected the jury in telling them that the letter was privileged.

Dugdale, Q.C., and *J. V. Fitzgerald*, shewed cause. The direction was right. The jury having found that the letter was written without malice or indirect motive, the privilege which undoubtedly would attach to the communication of the letter to the chairman was not lost, because by an honest mistake the defendant sent the letter to a wrong person. There is no direct authority on the question. [They referred to *Fox* v. *Broderick* (1); *Waring* v. *McCaldin* (2); *Parsons* v. *Surgey* (3); *Scarll* v. *Dixon* (4); *Harrison* v. *Bush* (5); *Lawless* v. *Anglo-Egyptian Cotton and Oil Co.* (6)]

Lawrance, Q.C., and *W. Graham*, supported the rule. Assuming the letter was a privileged communication if sent to the chairman, no privilege attached to the publication, through the defendant's own negligence, to the plaintiff's brother. It is

(1) 14 Ir. C. L. 453.
(2) 7 Ir. Rep. C. L. 282.
(3) 4 F. & F. 247.
(4) 4 F. & F. 250.
(5) 5 E. & B. 344.
(6) Law Rep. 4 Q. B. 262.

analogous to the case of a man having in his possession a dangerous weapon; he is responsible if by reason of his negligence injury is caused to another. The negligence here was in the act of publication; it is not like the case of a man who negligently leaves a letter containing a libel lying about in his room so that it is read by another. There must be so much intention in the defendant's mind as suffices to carry out the act of publication, and then on general principles he is responsible if he publishes to the wrong person. Lord Campbell in *Harrison* v. *Bush* (1) indicated the point under discussion here, but declined to give an opinion upon it. [They also referred to *Shepherd* v. *Whitaker* (2) and *Reg.* v. *Holbrook.* (3) (4)]

WATKIN WILLIAMS, J. I am of opinion that this rule should be discharged. The position of the parties is this: [The learned judge stated the facts.] The action is founded upon the allegation that the defendant falsely and maliciously wrote and published of the plaintiff the letter set out in the statement of claim. The learned judge at the trial directed the jury that the occasion upon which, and circumstances under which, the letter was written made it privileged. It was therefore necessary that the plaintiff in order to succeed should prove not only that the words complained of in the letter were defamatory, in the sense of being injurious, but also that they were written with actual malice. The jury gave a verdict for the defendant, and this rule was obtained on the ground of misdirection. The law stands thus, if a man writes and publishes of another that which is defamatory and untrue the

(1) 5 E. & B. at p. 350.
(2) Law Rep. 10 C. P. 502.
(3) 3 Q. B. D. 60.
(4) It was also contended in argument by the defendant's counsel, (1) that the relation existing between the defendant and the plaintiff's brother as director and secretary respectively of the company, was such as to make the publication of the letter to the plaintiff's brother privileged, apart from any question of mistake; and (2) that the jury, having given a general verdict on the issues left to them, must be taken to have found that the statements in the letter were not libellous per se. The Court gave no decision on the first of these contentions. With respect to the second, they thought, from a question put by one of the jury after the close of the summing-up, that the verdict was founded on the view that the statements in the letter were libellous, but that it was written without malice.

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law will imply malice on his part, and the plaintiff need furnish no evidence whatever of malice; he need only prove the defamatory and untrue character of the statements of which he complains. But there are occasions on which the law regards the defendant as so placed and having such an interest with respect to the subject-matter of the libel that, upon principle founded on common sense, the legal implication of malice is removed. That is the doctrine of privilege. The question here is whether or not the defendant was so circumstanced with respect to the subject-matter of the letter that the primâ facie implication of malice, which the law would otherwise make, was rebutted. It is admitted that the defendant stood in such a relation to Colonel Wood that in writing to him the legal implication of malice was technically rebutted, and the defendant, in the absence of malice in fact, was protected by privilege; but it is contended for the plaintiff that, the defendant having carelessly put the letter in the wrong envelope, so that it reached the hands of a person with whom he had no such relation, the protection of privilege is destroyed, and the case put into the condition in which the law implies malice. I think there is a fallacy in that contention. The defendant's state of mind was never altered. His intention was always honestly to do that which he conceived to be his duty. I can see nothing to justify the conclusion, as matter of law, that by reason of the defendant's inadvertence the case is taken out of the category of privilege, so that malice should be implied. There is no direct authority on the question, though there have been cases to the effect that mere accident or inadvertence in using language, or publishing writing, spoken or written on a privileged occasion will not supply the necessary evidence of malice in fact which will destroy the privilege. I am of opinion that there was no misdirection.

MATHEW, J. I am of the same opinion. I come to the conclusion that the rule ought to be discharged for the reason that there was no evidence that the defendant had any malicious feeling in writing the letter and sending it to the plaintiff's brother. Nothing more than negligence was shewn; the letter was written honestly to the chairman, and a mistake was made through the

defendant's negligence. It is said that for the consequences of that negligence he is responsible. If that view be correct, on the same principle this action would lie if all that the defendant did was to leave the letter about so that another could read it. I may add that the evidence of negligence here was extremely slight, because any one looking at the first line of the letter would see that it had been put by mistake into the wrong envelope.

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Rule discharged.

Solicitors for plaintiff: *Robinson, Preston, & Stow, for Rowlands, Bagnall, & Co., Birmingham.*

Solicitors for defendant: *Coopers.*

W. A.

[IN THE COURT OF APPEAL.]

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March 21.

WOODLEY & Co. *v.* MICHELL & Co.

Shipping—Bill of Lading—Perils of the Sea—Collision—Negligence.

A collision between two vessels brought about by the negligence of either of them, without the waves or wind or difficulty of navigation contributing to the accident, is not "a peril of the sea" within the terms of that exception in a bill of lading.

THIS was an action by the indorsees of a bill of lading for the non-delivery of a cargo of barley shipped under such bill of lading on board the defendant's sailing vessel, the *Kate*, at Caen, to be carried to London and there delivered to the order of the shipper, "perils of the sea" excepted. On the voyage the *Kate*, whilst coming up the Thames, met and collided with a steamer the *Fyenoord*, then going down the river. In consequence of this collision the *Kate* sunk, and her cargo of barley was lost, and the defendants relied on this as a loss by the perils of the sea within the exception of the bill of lading. At the trial, before Hawkins, J., during the London Trinity Sittings of 1882, it appeared that the collision was brought about by the captain of the *Kate* having starboarded her helm, but there was conflicting evidence as to whether there had not previously been a starboarding by the *Fyenoord* by which the *Kate* was placed in

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difficulty. The jury found that the collision was occasioned by the captain of the *Kate* starboarding her helm, but that there was no negligence on the part of the captain and crew of the *Kate*. On this finding the learned judge entered the verdict for the defendants, for whom he also gave judgment.

The plaintiffs appealed.

Butt, Q.C., and *Tyser*, for the plaintiffs. On the finding of the jury the plaintiffs were entitled to judgment. It was for the defendants to bring the case within the exception in the bill of lading, and to shew that the loss arose from a peril of the sea. They failed to do so here, for the collision was caused by the act of those on board the defendants' vessel who were navigating her. Assuming that this was brought about by the act of the steamer, still the defendants would not be protected, for there was clearly a breach of the rule of navigation made by the Thames Conservancy, by which a steamer is required to keep out of the way of a sailing vessel, and the sailing vessel is required to keep her course. The expression "perils of the sea" does not extend to collision, except arising from accidents not brought on by negligence. The question was discussed in *Chartered Mercantile Bank of India* v. *Netherlands Steam Navigation Co.* (1), and in his judgment in that case Brett, L.J., said (2), "if the collision is caused without any fault on the part of the carrying ship, but is caused by reason of negligence on the part of those who are conducting the other ship, it cannot be called an accident of the sea." . . . . "Therefore if no exception were contained in the bill of lading, except that of accidents of the sea, although there was no fault on the part of those on board the ship carrying the goods, although the collision was caused by the sole default of those on board the other ship, the owner of the carrying ship would be liable on the first part of the bill of lading."

[BRETT, L.J. What I there said was not necessary for the decision of that case.]

No, but it is a dictum that the exception of perils of the sea will not cover a loss by collision brought about by the negligent

(1) 10 Q. B. D. 521. (2) 10 Q. B. D. at p. 530.

act of man. The case of *Buller* v. *Fisher* (1) is referred to by Lindley, L.J., in *Chartered Mercantile Bank of India* v. *Netherlands Steam Navigation Co.* (2) as an authority for shewing that a collision not occasioned by the negligence of the carrying ship would be within the exception in a bill of lading as to "perils of the sea," but that case must not be taken as supporting the proposition that a collision brought about by the negligence of the other ship would be within such exception. What Lord Kenyon there said was that the defendants were exempt "against accidents happening without fault in either party," and because in his opinion neither ship could be deemed to be in fault, he held "that this misfortune must be taken to be within the exception of the perils of the sea." In Abbott on Shipping, 12th ed. p. 330, after referring to the case of *Pickering* v. *Barclay* (3), where the ship had been plundered by pirates, he states that the owners were held to be not answerable for the goods, "because says the reporter, the taking by pirates was accounted a peril of the sea," and after citing another case, he adds, "this however is to be understood only in the case the ship does not fall into the hands of pirates by any negligence or fault of the master." At p. 331, Lord Tenterden draws a distinction between *Buller* v. *Fisher* (1) and *Proprietors of the Trent Navigation* v. *Ward* (4), where a vessel had struck against the anchor of another to which there was no buoy, and where the persons belonging to both vessels had been guilty of negligence, and he says that if in that last case "it be taken that negligence was imputable only to the master who had left his anchor without a buoy then he was answerable over to the master and owners of the vessel whose cargo had been injured; and indeed the accident happened in the course of a navigation to which the exception of the perils of the sea did not apply."

There is a distinction between policies of insurance and bills of lading as regards a loss by perils of the sea, because in the former only the causa proxima is regarded, whilst in the latter it is the causa causans. This explains why in *Smith* v. *Scott* (5),

(1) 3 Esp. 67.
(2) 10 Q. B. D. at p. 542.
(3) 2 Roll. Abr. 248.
(4) 3 Esp. 127.
(5) 4 Taunt. 126.

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which was an action on a policy of insurance, a loss occasioned by another ship running down the ship insured through gross negligence was held to be a loss by perils of the sea.

[BRETT, L.J., referred to what is stated in the judgment in *Smith* v. *Nugent* (1), as to injuries occasioned by the act of God.]

In 3 Kent's Commentaries, part 5, lect. 47, p. 217, it is stated perils of the sea denote natural accidents peculiar to that element which do not happen by the intervention of man nor are to be prevented by human prudence.

Webster, *Q.C.*, and *H. Sutton*, for the defendants. According to the finding of the jury the collision was brought about, without any negligence on the part of those on board the *Kate*, by the reason of some manœuvre of the steamer. The collision arose therefore from an accident, and it was one of the risks or perils of the sea as much as a loss by the act of pirates or the like. The case of *Lloyd* v. *General Iron Screw Colliery Co.* (2), is an authority no doubt that the exception in a bill of lading of "perils of the sea," would not cover a loss from a collision caused by the negligence of those navigating the carrying ship; but that is no reason why, if the loss was from the act of the other vessel, that would not be an accident or peril of the sea. In 1 Parson's Maritime Law, chap. 7, p. 190, which is referred to in that case it is stated, "If the collision occurred from the irresistible force of tide or storm, the ship is excused, because the loss was occasioned by a peril of the sea. But if the collision occurred wholly through the fault of another vessel, and most unnecessarily, but without any fault on the part of the ship which contains the damaged cargo, then the ship is not excused, whether there be a bill of lading or not, such collision being neither an act of God 'nor a peril of the sea.'" However in 1 Parson's Law of Shipping, chap. 7, p. 259, which is a later edition of Parson's Maritime Law, this passage is altered to the following: "When the cargo is lost or damaged by a collision between the carrier vessel and another, the liability of the carrier depends upon the nature of the collision, and also upon the obligation he has assumed. A collision may be caused by the fault of neither ship, that is by inevitable accident, by the fault

(1) 1 C. P. D. 19, at p. 22.

(2) 3 H. & C. 284; 33 L. J. (Ex.) 269.

10 Jur. N.S. 661.

of the carrier ship, by the fault of the other ship, and by the fault of both. If neither vessel is in fault, the collision is clearly a peril of the sea, and under some circumstances may clearly be an act of God. If the carrier ship is in fault, she is clearly liable. If the other vessel is entirely in fault, the loss is not an act of God, but is a peril of the sea, and the liability of the carrier depends in such a case upon the obligation he has assumed." For this last statement, which, if correct, would relieve the defendants in this case, the following American authorities are cited: *Hayes* v. *Kennedy* (1), and *The Steamboat New Jersey, Olcott.* (2)

[BRETT, L.J. In *Hayes* v. *Kennedy* (1), the bill of lading excepted "the unavoidable dangers of the river navigation and fire": see Angell on Carriers, 5th ed. p. 153, note (*a*).]

Dangers of the river or sea and perils of the sea are synonymous terms. They would include any act of navigation which was not a negligent one.

BRETT, L.J. This appeal, I think, must be allowed. The jury, we must take it, have found that the collision was caused by the sailing vessel starboarding her helm; but that that starboarding of her helm under the circumstances was not negligence. They have found nothing with regard to the steamer, and the question is whether, upon this finding, under the circumstances, with regard to a collision between a sailing vessel and a steamer, the judgment ought to be for the plaintiffs, who are the owners of cargo on board the sailing vessel, or for the owners of the sailing vessel.

Now it seems to me that all that the plaintiffs had to prove was the non-delivery of their goods at the end of the voyage. The defendants could answer the plaintiffs' case only by showing that they were prevented from delivering the goods by some exemption in the bill of lading. Now this bill of lading, though written in French, is an English bill of lading, because it was given by an English captain on board an English vessel with regard to a voyage to England. It excepts "perils of the sea," and it lay, therefore, upon the defendants, the shipowners,

(1) 41 Penn. State, 378. (2) Adm. 444, 448.

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to bring the case within that exception. Now I am not prepared to retract anything I said in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Co.* (1), but I do not think that all I said in that case was necessary for its decision, nor need this Court now consider whether what I said there was in the whole right or wrong. What I think it is necessary in this case to say (and I repeat it without any doubt) is, that although a collision when brought about without any negligence of either vessel is or may be a peril of the sea, a collision brought about by the negligence of either of the vessels, so that without that negligence it could not have happened, is not a peril of the sea within the terms of that exception in a bill of lading. Therefore it seems to me that the defendants fail upon the findings of the jury alone to bring their case within the "excepted perils," because the jury have only found in the defendants' favour that the collision was brought about without negligence on the part of their vessel, and they have not found that it was also without the negligence of the other vessel. But if I look at the findings with regard to the real state of things, namely, that this collision took place between a sailing vessel and a steamer; it seems to me inevitable that the defendants should fail, because the Court is bound to take notice of the rule that it is the duty of a steamer to keep out of the way, and of a sailing vessel to keep her course.

It is true that according to *The Bywell Castle* (2) there may be a case in which, under very peculiar circumstances, namely, where the vessel is put into such a position of extreme peril by the negligence of the steamer as to make it unreasonable to expect that the master of the sailing vessel should obey the rule, that although the sailing vessel does not keep her course her master may not be guilty of negligence; but unless he has that excuse, the fact of his disobeying the rule is conclusive evidence against him of negligence. Indeed it was held in the House of Lords (3) that even under those extreme circumstances, if the collision is at sea, the vessel which fails to observe the rule made

(1) 10 Q. B. D. 521.
(2) 4 P. D. 219.
(3) See *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Co.*, 5 App. Cas. 876.

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by the statute is to be deemed to have been negligent and in the wrong. I bow, of course, to that decision. Therefore it seems to me that the defendants are in this inevitable difficulty. The only way in which the finding of the jury with regard to the starboarding not being negligent can be a right finding, is to assume that the captain of the sailing vessel was put into such a position by the negligence of the steamer that he might be excused for disobeying the rule. If so, the collision was caused by the negligence of the steamer, and without the negligence of the sailing vessel; but where there is negligence in either vessel, it is clear law that the collision is not a peril of the sea within the meaning of that term in a bill of lading. Therefore, in which ever way one looks at it, it seems to me that the defendants have failed.

COTTON, L.J. I am of the same opinion. In this case the plaintiffs sue for non-delivery of goods which the defendants contracted to carry, and the defendants are clearly liable, unless there is something in the bill of lading which excuses them. What they rely upon is the exception there from liability for any loss occasioned by the perils of the sea. Now, it is possible that the words "perils of the sea" in bills of lading may have had a meaning given to them which would have supported the contention of the defendants. What has been found in this case is that the collision was caused by the act of the master of the *Kate* starboarding her helm, but that such act was not negligence. Now, there is no decision which is binding upon us that a collision occasioned by the negligence of one of the ships is a peril of the sea. Looking, then, upon it with reference to decided cases, and according to the ordinary interpretation of words, I cannot see how, if there was no peril from sea or wind, and an accident is caused by the negligent act of one of the two ships which comes into collision, that can be said to be a peril of the sea. In my opinion that which results, not from difficulty of navigation in itself, but from the negligent act of man without any difficulty of waves or wind contributing to the accident is not a peril of the sea. In order to shew that the case was within the exception in the bill of lading, it was for the defendants to prove

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their case and shew that the accident, which, under the admitted circumstances of the case occurred in open daylight, without any difficulty of wind or wave, was an inevitable accident. But that is not the finding of the jury. It is simply that there was no negligence on the part of one of the vessels, that is to say, on the part of the vessel of the defendants; that would not bring the case within the exception. But I quite agree with Brett, L.J., that that finding can only be right on the supposition that the steamer was in the wrong, that is to say, that its master and crew had been guilty of negligence. Therefore, in whichever way one looks upon it, the collision was caused by the negligence of one of the parties. The defendants, therefore, have not made out their case, and so have not excepted themselves from liability.

BOWEN, L.J. I am of the same opinion. The plaintiffs are entitled to succeed unless the shipowners can shew that this was a loss caused by the perils of the sea. The jury have found that the loss was caused by the starboarding of the helm of the *Kate*, the carrying ship, and that there was no negligence on the part of those who were navigating the *Kate* in so starboarding her helm. It is clear to me that on that finding alone the defendants, the owners of the *Kate*, cannot ask to have the verdict and judgment entered for them, because such finding leaves it still in doubt whether the loss would be a loss by the perils of the sea. More would be necessary, in my view of the case, to entitle the defendants to succeed. But the case does not stop there, and we have to consider whether taking that finding with the admitted facts, there is any evidence at all upon which the jury would be justified in finding that there was a loss through the perils of the sea.

What are the facts? The steamer was coming down the Thames, and the sailing vessel, the *Kate*, was going up, under no difficulties of wind, tide, or weather, and not in any danger at all, and all that appears is that she was driven to starboard her helm by the action of the steamer. It seems to me that if the action of the steamer drove her to do so, primâ facie the steamer must have been negligent, because it is the duty of the steamer to keep out of the way of the sailing vessel. Under these circumstances,

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was there any evidence at all to go to the jury of loss by perils of the sea when, there being no circumstances of wind, weather, or navigation unfavourable to the ship, or involving the least danger, that ship is going up a river like the Thames, and she is run down by a negligent steamer? It seems to me that there was not, and it is on that ground, though I do not dissent in the least from what Brett, L.J., has said, that I think the defendants are not entitled to have the verdict and judgment in their favour, and that judgment should be entered for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Waltons, Bubb, & Walton.*
Solicitors for defendants: *Clarkson, Greenwell, & Wyles.*

W. P.

[IN THE COURT OF APPEAL.]

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Dec. 20.

THE COMPAGNIE FINANCIERE ET COMMERCIALE DU PACIFIQUE *v.* THE PERUVIAN GUANO COMPANY.

Practice—Production of Documents—Affidavit of Documents—Application for further Affidavit—"Material to any Matter in Question in the Action"—Rules of Supreme Court, 1875, *Order XXXI., rule* 12.

Documents are material to the matters in question in the action within the meaning of Order XXXI., rule 12, if it is not unreasonable to suppose that they may contain information directly or indirectly enabling the party seeking discovery, either to advance his own case, or to damage the case of his adversary.

The plaintiff company sued the defendant company for breach of contract: the defence to the action was that no contract had been concluded, and that only negotiations had taken place between the parties. The defendants having obtained an order for an affidavit of documents, the plaintiffs set out, amongst others, their minute-book, which referred to certain documents and letters; the entries as to these documents and letters were of a date subsequent to the date of the alleged breach of contract; the documents and letters were not set out by the plaintiffs in their affidavit. The defendants claimed a further and better affidavit from the plaintiffs, setting out the documents and letters above-mentioned, on the ground that they might show that after the alleged breach the parties were still negotiating, and might tend to disprove the plaintiffs' allegation that a contract had been concluded:—

Held, that the plaintiffs were bound to make a further affidavit of documents.

APPEAL by the defendants from a decision of a Divisional Court, affirming an order of Pearson, J., for limited affidavit as to documents.

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The plaintiffs claimed specific performance of an agreement entered into with the defendants for the delivery of certain stocks of guano which were in their hands; the plaintiffs further claimed damages for delay in performing the agreement, and also an injunction.

The defendants were agents under a contract made with the Republic of Peru, whereby the Republic assigned all guano to the defendants for sale in England, and also in various countries in Europe. An action of detinue was brought by the plaintiffs against the defendants, in which the plaintiffs alleged that they had become the assignees of the Republic of Peru for all guano, which was in the possession of the defendants. Pending this action, the plaintiffs commenced the present action, in which they alleged that the parties had entered into negotiations for the settlement of the first action, and for the delivery of the guano, and that such negotiations terminated in a verbal agreement on the 6th of October, 1881, which was subsequently embodied in writing and sent to the defendants to London to sign; but that the defendants declined to sign it and to carry out the arrangement. The day of the alleged breach was the 1st of November. The defence alleged that the persons who negotiated the arrangement were not authorized to do so on behalf of the respective companies; and, further, that the matter never went beyond negotiation, and continued negotiation up to, and subsequent to, the 6th of October.

The defendants obtained an order under Rules of the Supreme Court, 1875, Order XXXI. rule 12, for an affidavit of documents. The plaintiffs, by their manager, made an affidavit of documents in the usual form, in which they disclosed, inter alia, the minute-book of the proceedings of the plaintiff company. The defendants claimed discovery of the following documents, which were disclosed in the minute-book: first, drafts of arrangement between the Peruvian Guano Company, and the plaintiff company, referred to in the board minutes of the plaintiff company, dated the 28th of September, 1881; secondly, the letter and two telegrams received by the plaintiffs from Mr. Adams, referred to in the board minutes of the plaintiff company, dated the 2nd of November, 1881; thirdly, two further drafts relating

to the form of communication to be made, and the letter from M. de Germiny to M. Homberg, respectively referred to in the board minutes, dated the 3rd of November, 1881; fourthly, a letter addressed to Mr. Adam, referred to in the board minutes, dated the 8th of November, 1881; and, fifthly, several letters written from London by Mr. Adam to the plaintiff company, or directors thereof, and the several letters and telegrams sent by the plaintiff company, or directors thereof, to Mr. Adam, as referred to in the board minutes, dated the 16th of November, 1881. The minute with regard to documents No. 2, was in French, to the following effect:—"The president reads a letter and two despatches received from Mr. Adam, at this moment in London, which unfold to the company the new difficulties which the Peruvian Guano Company raise, who seem no longer willing to carry out their engagements."

The defendants took out a summons for further affidavit of documents. The master declined to make an order. On appeal, Pearson, J., sitting at chambers, made an order for a further affidavit of documents as to No. 1, on the ground that they were in existence before the date of the alleged contract; and he refused the application as to the remainder. In the Queen's Bench Division, the Court (Field and Stephen, JJ.,) were divided in opinion, Field, J., thinking that the documents ought to be produced, while Stephen, J., thought that the decision of Pearson, J., was right. The appeal was accordingly dismissed. The defendants appealed to this Court.

Dec. 16, 20. *Shiress Will*, for the defendants. The defendants are entitled to an order for a further affidavit as to documents on the part of the plaintiffs. The affidavit which has been made has disclosed certain entries in the minute book of the plaintiff company, and amongst these is one of the 2nd of November, 1881, which refers to a letter and two telegrams, and there are others of the 3rd, 8th, and 16th of November, 1881, also referring to telegrams and letters. If the minutes themselves are relevant, so must be the matters which are therein referred to, and the right of the defendants to a further affidavit and discovery as to these documents comes within the rule laid down by

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the Court of Appeal in *Jones* v. *Monte Video Gas Co.* (1) The parties were only negotiating; no contract was concluded.

If the documents, of which production is sought, relate to some matter in question in the action within the meaning of Rules of the Supreme Court, 1875, Order XXXI. rule 12, it is unnecessary to shew that they can be relied upon as evidence at the trial, or even that they bear upon the issues.

Russell, Q.C., and *Pollard*, for the plaintiffs. The affidavit made by the plaintiffs is primâ facie binding on the defendants, it is exhaustive, and it lies on the defendants to shew that it is incorrect. To succeed upon this application, the defendants must shew that the documents have been wilfully, or at all events wrongfully, withheld by the plaintiffs. The defendants ought not to have applied for a further affidavit; if they are not satisfied with the plaintiffs' affidavit of documents, they ought to have administered interrogatories. The defendants, before they can succeed in the present application, must shew that the omitted documents are material; and this they have wholly failed to do.

[BRETT, L.J. The judgments in *Jones* v. *Monte Video Gas Co.* (1), do not lay down any rule as to what documents must be produced; they merely prescribe the tests by which it may be ascertained whether the party making the affidavit has properly set out the documents.]

The documents, of which the defendants seek discovery, are not shewn to be material and relevant to the action. Further, there is no evidence as to documents No. 3, that they ever were in the plaintiffs' possession.

The defendants might shew by affidavit that the documents sought to be discovered are material to the question in the cause.

[BRETT, L.J. It seems to me that those documents are material to the matters in question in the action within the meaning of Order XXXI. rule 12, as they, it is not unreasonable to suppose, may contain information enabling the party seeking discovery, either to advance his own case or to damage the case of his adversary.]

A document is not "material," unless it relates to the subject-

(1) 5 Q. B. D. 556.

matter of the action, and the documents of which production is sought do not relate to the question in dispute.

Shiress Will, in reply. The defendants are not bound by the description of the documents given in the plaintiffs' affidavit: *Attorney General* v. *Emerson* (1); *Saull* v. *Browne* (2); *Noel* v. *Noel*. (3)

BAGGALLAY, L.J. This action is brought for an alleged breach of an alleged contract; the defence is that there was no contract and no breach; that the whole matter rested in negotiation. The plaintiffs made an affidavit of documents under Order XXXI. rule 12; but the defendants were dissatisfied with it, and applied for a further affidavit as to certain documents, which may be described as Nos. 1, 2, 3, 4, 5. The application came on to be heard by Pearson, J., by way of appeal from the Master, who had refused to make any order; Pearson, J., ordered a further affidavit as to No. 1, but refused it as to the others; by reason of a difference of opinion in the Queen's Bench Division, his decision was affirmed, and hence the present appeal.

The case of *Jones* v. *Monte Video Gas Co.* (4), has laid down rules of real importance, as to the circumstances under which a further affidavit of documents will be required; it has decided that, when a party has denied by his affidavit that he has in his possession any documents "relating to any matter in question in the action," no further affidavit will be required, unless it can be shewn, (a) from the affidavit itself, or (b) from the documents therein referred to, or (c) from an admission in the pleadings of the party swearing the affidavit, that other documents exist in his possession or power, which are material or relevant to the question in dispute in the action. The present application is based on the second of these tests. It is contended by the defendants that it appears from the minute book of the company, which is referred to in the first affidavit, that the documents described as Nos. 2, 3, 4, and 5, are in the possession or power of the plaintiffs and that they relate to questions in the action.

I assent to the suggestion made by Brett, L.J., in the course

(1) 10 Q. B. D. 191.
(2) Law Rep. 17 Eq. 402.
(3) 1 De G. J. & S. 468.
(4) 5 Q. B. D. 556.

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of the argument, that a document, which, it is not unreasonable to suppose, may tend either to advance the case of the party seeking discovery, or to damage the case of his adversary, should be regarded as a document relating to a matter in question in the action. I proceed to apply these tests to the documents in respect of which this appeal is brought. As regards No. 3, the objection taken by the plaintiffs, that it does not appear from the affidavit already sworn that it is in the possession or power of the plaintiffs, must I think prevail; but as regards Nos. 2, 4, and 5, I am of opinion that it appears from the minutes that they are in the possession or power of the plaintiffs, and that it is not unreasonable to suppose that they may contain information, directly or indirectly, enabling the defendants to advance their own case or to damage the case of their adversaries. We must bear in mind that the case of the defendants is that there was negotiations only, and not a concluded contract, whilst the contention of the plaintiffs is that there was a contract, and that the defendants have committed a breach of it. I think it unnecessary to go through the documents in detail; but I will refer to No. 2, by way of illustration; there is an entry upon the minute book of the plaintiffs, under date of the 2nd of November, to the effect that the president read a letter and two telegraphic despatches received from Mr. Adam, the agent of the company in London, who pointed out to the company new difficulties to which the Peruvian Guano Company, the defendants, had given rise, and which appeared to indicate that they were no longer intending to carry out their original engagements. It appears to me that a letter and telegraphic despatches, which are so described in the minutes, must have, upon a reasonable view of the case, a bearing upon the question really in conflict between the two parties, whether there was an actually concluded contract, or only a bargaining or negotiation continuing from time to time; and if this view is correct, I can come to no other conclusion than that a further affidavit ought to be made. The appeal consequently must be allowed as regards Nos. 2, 4, and 5.

BRETT, L.J. In this case the defendants under the rules and orders took out a summons requiring the plaintiffs to make an

affidavit of all documents in their possession or under their control relating to any matter in question in the action: thereupon the plaintiffs made an affidavit setting out many documents, which they admit to be in their possession and under their control, and which they admit, in some sense, to relate to matters in question in the action. The defendants have taken out another summons, which calls upon the plaintiffs to shew cause why they should not make a further affidavit. The meaning of that summons seems to me to be this, that the plaintiffs did not in their affidavit set out all the documents which they ought to have set out in that affidavit. Upon this second summons of the defendants the first question raised is, what must the defendants shew in order to support it. It seems to me that they must shew necessarily that the plaintiffs had not set out in the affidavit all the documents which they ought to have set out. Before *Jones* v. *Monte Video Gas Co.* (1) was decided, uncertainty was felt as to the sources from which the Court might derive information in order to determine whether the party, against whom the application was made, had given a proper answer. In this case the plaintiffs in their affidavit set out all the documents which in their view they ought to set out. It was decided in *Jones* v. *Monte Video Gas Co.* (1) that a contentious affidavit, as it was called, of the party making the second application, can not be looked at, that is to say, that if nothing appeared in the affidavit made on the first summons, and if nothing can be gathered from other sources which I will presently mention, the party taking out the second summons cannot be heard to say in opposition to the affidavit of his opponent that he believes, and has good grounds for believing, that that opponent has other documents material to the question in the action. It was held in *Jones* v. *Monte Video Gas Co.* (1) that the only sources into which the Court could look in order to ascertain whether the first affidavit was sufficient or not, was the affidavit itself, or the documents referred to in that affidavit, or the pleadings which had been delivered between the parties, and that in order to justify an order upon the second summons the Court must be satisfied from one of those sources that the party

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making the first affidavit had omitted to set out in it some documents which are material to the question in dispute in the action. The case of *Jones* v. *Monte Video Gas Co.* (1) did not enter upon the question as to the nature of the documents, which may be required to be produced. In the present case the sources from which the defendants say that they can shew that the plaintiffs have not set out all the material documents, are the documents mentioned in the plaintiffs' affidavit. Therefore the question in the present case is not governed by *Jones* v. *Monte Video Gas Co.* (1); it goes beyond the decision in that case. The question is not as to the sources to which the Court must look, but as to the nature of the documents which ought to be set out in the affidavit. The nature of the documents, which ought to be set out in the affidavit, may be gathered from the rules and orders of the Judicature Acts. The party swearing the affidavit is bound to set out all documents in his possession or under his control relating to any matters in question in the action. Then comes this difficulty: What is the meaning of that definition? What are the documents which are documents relating to any matter in question in the action? In *Jones* v. *Monte Video Gas Co.* (1) the Court stated its desire to make the rule as to the affidavit of documents as elastic as was possible. And I think that that is the view of the Court both as to the sources from which the information can be derived, and as to the nature of the documents. We desire to make the rule as large as we can with due regard to propriety; and therefore I desire to give as large an interpretation as I can to the words of the rule, "a document relating to any matter in question in the action." I think it obvious from the use of these terms that the documents to be produced are not confined to those, which would be evidence either to prove or to disprove any matter in question in the action; and the practice with regard to insurance cases shews, that the Court never thought that the person making the affidavit would satisfy the duty imposed upon him by merely setting out such documents, as would be evidence to support or defeat any issue in the cause.

The doctrine seems to me to go farther than that and to go as

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far as the principle which I am about to lay down. It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* —not which *must*—either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary, if it is a document which may fairly lead him to a train of inquiry, which may have either of these two consequences: the question upon a summons for a further affidavit is whether the party issuing it can shew, from one of the sources mentioned in *Jones* v. *Monte Video Gas Co.* (1), that the party swearing the first affidavit has not set out all the documents falling within the definition which I have mentioned and being in his possession or control. I agree that the party issuing the summons for a further affidavit is bound by the description given in the sources of information mentioned in *Jones* v. *Monte Video Gas Co.* (1): that is to say, he is bound to a certain extent: I do not think that he would be bound absolutely by every description of their contents if the Court can see, from the nature of them, that the description of them is not or may not reasonably be correct. I do not think that the Court is bound any more on the second summons than on the first to accept absolutely everything which the party swearing the affidavit says about the documents, but the Court is bound to take his description of their nature. The question must be, whether from the description either in the first affidavit itself or in the list of documents referred to in the first affidavit or in the pleadings of the action, there are still documents in the possession of the party making the first affidavit which, it is not unreasonable to suppose, do contain information which may, either directly or indirectly, enable the party requiring the further affidavit either to advance his own case or to damage the case of his adversary. In order to determine whether certain documents are within that description,

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it is necessary to consider what are the questions in the action: the Court must look, not only at the statement of claim and the plaintiffs' case, but also at the statement of defence and the defendants' case. In the present action it is true to say that the contention of the plaintiffs is that there was a concluded agreement, and that there was a breach of that agreement on a particular day. I quite agree that these documents, which are referred to in the minutes to which our attention has been drawn, cannot affect the plaintiffs' case if it be true; for the documents, of which production is now sought, came into existence after the alleged breach. But the defendants' case is that there never was a concluded agreement, and of course there never was or could be a breach of an agreement which never existed. The defendants' case is that, from the beginning to the end of the whole transaction, even up to the time of bringing the action, the whole matter was in negotiation—there was one unbroken series of negotiations. Therefore, if the defendants can shew that there are documents in the possession of the plaintiffs which, it is not unreasonable to suppose, do contain information which may support the defendants' case, those documents, as it seems to me, ought to have been set out by the plaintiffs in the original affidavit, and must be set out by them in a further affidavit. That drives us to the question whether the documents are such as do contain, in our opinion, matters which may support the defendants' case that there were merely continuing negotiations. Take the minute with regard to documents No. 2, according to which the president read a letter and two despatches received from Mr. Adam, and setting forth to the company the new difficulties which the Peruvian Guano Company were raising. It is said that these documents cannot be material because they are subsequent to the date when the contract is alleged to have been entered into; but as the case for the defendants is that there were continuing negotiations, new propositions in a continuing negotiation are part of the negotiation; and therefore it seems to me that the defendants do shew that the plaintiffs have documents in their possession which may reasonably be supposed to support the defendants' case, if the defendants' case is true. I have felt very great difficulty in differing from Pearson, J., because there is no

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judge whose opinion I should more anxiously regard: but as to No. 2, I am bound to say that I think he gave too minute a construction to rule 12 of Order XXXI., and that he insufficiently considered not only what was the plaintiffs' case, but also what was the defendants' case. With regard to the other documents, except No. 3, to which my learned Brother has alluded, it seems to me that they are in the same category as No. 2, unless they are attempts to negotiate a settlement or a compromise. If I thought that they did appear to be attempts at negotiation for a settlement, I should be clear that no affidavit ought to be made with regard to them, because negotiations to effect a settlement cannot be material with regard to matters in dispute in the action. I may be wrong, but I have come to the conclusion that it is not unreasonable to suppose that these are not negotiations for a settlement, but that they do contain information which may shew that there were continuing negotiations, and therefore they seem to me to be within the same category as documents No. 2. It may turn out that my view is wrong, and that these documents are attempts to negotiate a settlement, and if that is so, they will be properly rejected if they are offered in evidence at the trial; but what I say is, the rule which governs us at this moment is that they appear to be documents which, it is not unreasonable to suppose, do contain information which may support the defendants' case. Therefore I think that the further affidavit must be made with regard to them.

This judgment does not at all determine whether the defendants can have inspection of them after the further affidavit has been made, for after the affidavit has been made and privilege in respect of them has been claimed, on the ground that they are sworn to be matters of negotiation for a compromise, it may be that the defendants will have no right to inspect them. That is a matter as to which I say nothing; I give no opinion about it. The further affidavit must be made on the ground which I have mentioned; but with regard to documents No. 3, I think it impossible to say that the plaintiffs ought in their first affidavit to have set forth documents which are not in either their power or their control, and therefore, on the ground that the defendants, who now ask for a further affidavit with regard to them, fail to

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shew that they are documents which ought to have been mentioned in the first affidavit, no further affidavit is to be made as to them. I repeat that our present judgment does not convey any opinion as to the effect of the documents when they have been disclosed, and when they are offered in evidence at the trial.

Appeal allowed.

Solicitors for plaintiffs: *Freshfields & Williams.*
Solictors for defendants: *C. & S. Harrison & Co.*

J. E. H.

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March 13.

THE QUEEN *v.* SCHNEIDER.

Licensing Acts—Beer Dealers' Retail Licenses Act, 1882 (45 & 46 *Vict. c.* 34), *s.* 1—"*Off*" *Licenses—Renewal—Appeal.*

The right of appeal to quarter sessions, from a refusal of licensing justices to renew a certificate for a license to sell beer not to be consumed on the premises, has not been taken away by the Beer Dealers' Retail Licenses Act, 1882 (45 & 46 Vict. c. 34) s. 1.

RULE to quash an order of general quarter sessions of Lancaster, made subject to a Case, of which the following are the material parts.

The appellant is a grocer and beerseller at Barrow-in-Furness, and the respondents are the licensing justices for the licensing division of Barrow-in-Furness.

The appellant has for several years been the holder of a justices' certificate and an excise license to sell beer not to be consumed on his premises.

[The case then stated that the appellant applied for a renewal of his certificate, and facts were set out from which it appeared that the formalities required by the Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 42, and the Licensing Act, 1874 (37 & 38 Vict. c. 49) s. 26, to be observed in cases of opposition to the renewal of a certificate had not been complied with.]

The respondents who are personally well acquainted with the district, without hearing any evidence, and refusing to hear the evidence either of the appellant himself or any of his witnesses,

refused the certificate in the exercise of their discretion on its being admitted that the appellant was a grocer.

On appeal to the quarter sessions the respondents contended :—

1. That there was no appeal from their decision.

2. That they had power to refuse the certificate, notwithstanding the formalities of 35 & 36 Vict. c. 94, s. 42, and 37 & 38 Vict. c. 49, s. 26, had not been observed.

3. That there had been a sufficient compliance with the formalities directed by the said sections.

4. That if the said formalities had not been sufficiently observed, the appellant waived the non-observance of them by addressing the Court in support of his application.

5. That the quarter sessions ought not to allow the appeal without hearing the case on the merits.

The Court of quarter sessions decided the first four points in the appellant's favour, and after hearing the evidence tendered by the appellant, and having heard two witnesses for the respondents as to the requirements of the neighbourhood, and refused to hear further evidence of the respondents to the like effect, allowed the appeal.

If the Court is of opinion that there is no appeal to the Court of quarter sessions, then the decision of that Court is to be reversed with costs.

If there is an appeal, and the respondents are wrong on any one of the 2nd, 3rd, 4th or 5th contentions stated in the 11th paragraph, then the decision of the Court of quarter sessions is to stand, otherwise, to be reversed with costs.

A. L. Smith (*Hannen*, with him), shewed cause. The right of appeal to quarter sessions is not taken away by the Act of 1880 (43 Vict. c. 6), or the Act of 1882 (45 & 46 Vict. c. 34). It was admittedly taken away by 37 & 38 Vict. c. 49, s. 27, in applications for original licences, but was left in the case of renewals. The Act of 1880 merely gave an enlarged discretion to justices as to the grounds on which they might refuse certificates for additional licenses, taking away the limitation of the grounds of refusal contained in s. 8 of the Act of 1869 (32 & 33 Vict. c. 27). The Act of 1882 extended the provisions of the Act of 1880

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to all licenses, and gave justices an unqualified discretion in all cases as to the grounds of refusal; but it contains nothing that takes away the right of appeal. In *Reg.* v. *Kay* (1), this was assumed by both sides. The discretion exercised by the justices must be a judicial discretion: *Jarmain* v. *Chatterton* (2), *In re Martin.* (3) Here their refusal was based on a frivolous pretext. As to the formalities required by the Acts of 1872 and 1874, the quarter sessions have found as a fact that they had not been complied with, and that there had been no waiver of compliance on the part of the appellant; this Court will not review those findings.

Poland, and *Henry Shee*, in support of the rule. The language of the Act of 1882 is much wider than that of former Acts. The Act of 1880 took away the restrictions on their discretion imposed by the 8th section of the Act of 1869, but by the Act of 1882 all previous Acts bearing on the question were repealed, and a free and unqualified discretion was vested in the licensing justices. The intention of the legislature was to give to the licensing justices and no others, full and uncontrolled powers of granting and refusing licenses, and to take away any right of appeal then existing. The quarter sessions did not hear the case on the merits, which they were bound to do if they had jurisdiction to hear the appeal.

POLLOCK, B. This case raises several questions of general importance; some of the points raised do not indeed affect the determination of this case, and on those I abstain from expressing an opinion. There are, however, two points which it is necessary for us to decide; first, whether quarter sessions had jurisdiction to hear the appeal; and secondly, whether they did in fact hear it, so as to be able to come to a proper determination upon it.

The first question depends on the construction of the statutes, and the first to which I need call attention is 9 Geo. 4, c. 61. By the 27th section of that Act, an appeal was given to quarter sessions to any person who thought himself aggrieved by any act

(1) 10 Q. B. D. 213. (2) 20 Ch. D. 493.
(3) 20 Ch. D. 365.

of any justice done in or concerning the execution of that Act. This Act, however, applied only to inns and other houses licensed to sell exciseable liquors to be consumed on the premises, and for many years the legislature made no provision as to the granting of licenses to beerhouses. But in 1869 a statute was passed (32 & 33 Vict. c. 27), by which these licenses were provided for, and the 8th section of that Act enacted that the provisions of 9 Geo. 4, c. 61, including the provisions as to appeals, were to apply to certificates granted under that Act, and the section further went on to prescribe certain qualifications for a certificate which were to be taken into consideration by the justices. Subsequently Acts were passed dealing with the necessary qualifications to be considered, and by 35 & 36 Vict. c. 94, s. 42, certain provisions were enacted as to the procedure to be observed in the renewal of licenses. In 1874 the legislature passed a new licensing Act (37 & 38 Vict. c. 49), by the 27th section of which the appeal to quarter sessions from acts of justices with respect to the grant of new certificates was taken away. This left an appeal as before from the decision of justices as regards the renewal of licenses, and it is easy to understand the distinction drawn by the legislature between the two cases; the taking away of a license already granted must necessarily entail a heavy loss upon the person whose money has been laid out on the premises, and such a decision ought clearly to be subject to appeal.

Next came the Act of 1880 (43 Vict. c. 6), which took away part of the qualifications prescribed by s. 8 of the Act of 1869, and gave a discretion to the justices as to the grounds on which they might refuse to grant certificates for beer dealers' additional licenses. Finally, by the Act of 1882, the justices are to have a free and unqualified discretion to grant or refuse a certificate for such license. By this Act all the qualifications mentioned in the Act of 1869, or any other Act are taken away, and it is contended on behalf of the respondents, that the Act was not only a complete repeal of all existing qualifications, but that it is to be construed as meaning that there is to be no appeal from justices in these cases. As far as the language used in the Act is concerned, that observation would seem to be correct, for in previous Acts the word "discretion" alone is employed, and now for the

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first time that discretion is declared to be "free and unqualified." I cannot, however, think that that was the intention of the legislature when they passed this Act. I do not wish to make any remarks on the way in which Acts of Parliament are drawn, but I can well understand that in the present case the draughtsman used the most ample words he could find for the purpose of extending the discretion of the justices as to the grounds of refusal. Why should that be construed as taking away the right of appeal which up to that period undoubtedly existed? The right of appeal was given by an old Act, and existed for very many years; is it then taken away by a section which does not use apt and immediate words for the purpose? I think not; and I can see in the Act of 1882 no intention on the part of the legislature to take it away.

The second point is one of minor importance; but at the same time the Court should be careful to see that the quarter sessions decided the case upon its merits. The whole question really turns on the mode in which the fifth objection of the respondents was dealt with, and I think the appeal was heard on the merits. The Court of quarter sessions heard two witnesses who knew most about the requirements of the neighbourhood, and concluded that all matters against the appellant had been sufficiently heard. I am of opinion that the decision of quarter sessions must be upheld.

I may note as a matter of practice that the conclusion of the case stated by the sessions is not proper; in these cases the decision is entirely in the discretion of the Court.

NORTH, J. I am of the same opinion. It is quite clear that an appeal was given by the Act of Geo. 4. Then by s. 27 of the Act of 1874, the right of appeal was taken away in cases of application for new certificates; and this section shews that where the legislature takes away a previously existing right of appeal, it does so in clear and unambiguous terms. The only question on this point is whether the appeal in applications for renewal was taken away by the Act of 1882; that Act contains no such words as those in the Act of 1874, nor anything like them, and the question is whether the right has been taken away by

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indirect words. It is true that a much wider discretion is given to justices than that which they formerly had, which was qualified as to particular points; but wide as is the discretion given to them, I do not think it is free from appeal. In *Reg.* v. *Kay* (1) no such point was raised; this is not indeed conclusive, but is a fact which should not be entirely passed over.

As to the second point upon the merits. If a license is not renewed, it expires when the justices discontinue it; and the quarter sessions is bound to hear the question on its merits. In this case I think they clearly did so; the case itself shews it; otherwise they would not have heard evidence at all.

Rule discharged with costs.

Solicitors for appellant: *Tyas & Huntington, for Thompson, Barrow.*

Solicitors for respondents: *Parkers, for Major, Barrow.*

J. S.

FORSDIKE, APPELLANT; COLQUHOUN, RESPONDENT.

March 13.

Licensing Acts—Sunday Closing (Wales) Act, 1881 (44 & 45 *Vict. c.* 61)—"*Christmas Day and Good Friday.*"

By s. 3 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), "all premises in which intoxicating liquors are sold by retail, wherever situate, shall be closed on Christmas Day and Good Friday, as if Christmas Day and Good Friday were respectively Sunday."

By s. 1 of the Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61), all such premises are to be closed "during the whole of Sunday":—

Held, that the word "Sunday" in the Welsh Act only has its ordinary meaning, and that a conviction under that Act for unlawfully keeping open premises for the sale of intoxicating liquors on Christmas Day was bad.

CASE stated under 20 & 21 Vict. c. 43 by the stipendiary magistrate for Swansea. The material facts are as follows:—

By s. 3 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), "all premises in which intoxicating liquors are sold by retail, wherever situate, shall be closed on Christmas Day and Good Friday . . . . as if Christmas Day and Good Friday were respectively Sunday."

(1) 10 Q. B. D. 213.

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By the Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61), s. 1, all premises in which intoxicating liquors are sold by retail are to be closed during the whole of Sunday, and by s. 2 it is enacted that "the Licensing Acts, 1872–1874, shall apply in the case of any premises closed under this Act, as if they had been closed under those Acts." The appellant, who was the holder of a six-day licence under s. 49 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), was summoned under the Welsh Sunday Closing Act, 1881, for unlawfully keeping open his premises for the sale of intoxicating liquors therein at fifty minutes past 12 o'clock in the afternoon of Christmas Day. The fact was not disputed, and the only contention was whether the Welsh Sunday Closing Act applied to and included Christmas Day. The magistrate held that it did, and that the regulation for closing on that day and Good Friday followed those for closing on Sunday, and convicted the appellant in a nominal penalty.

Charles, Q.C. (*W. D. Benson*, with him), for the appellant. The preamble to the Act of 1881 shews the intention of the legislature to deal only with Sunday. The second section means that the penalty clauses under the Licensing Acts are to apply to this Act.

Brynmôr Jones, for the respondent. First. By the 1st section of the Act of 1874 that Act and the Act of 1872 are to be construed as one. The 3rd section of the Act of 1874 enacts that Christmas Day and Good Friday are to be considered as Sundays for the purpose of closing, and the appellant being the holder of a six-day licence was bound, irrespectively of the Act of 1881, to close on those days, which are by the Act of 1874 put on the same footing as Sunday.

Secondly, as to the effect of the Act of 1881. That part of s. 3 of the Act of 1874 which defines the closing hours on Sundays is virtually repealed as far as Wales is concerned; but the last clause, which treats Christmas Day and Good Friday as Sunday is still in force; it is a general enactment, and if contained in a separate Act would undoubtedly close all houses on those days.

Charles, Q.C., in reply, as to the first point. There is nothing in s. 49 of the Act of 1872 to make the holder of a six-day licence

close his house on Christmas Day and Good Friday; he could therefore keep it open during the hours specified in s. 24 of that Act. The effect of the last clause of s. 3 of the Act of 1874 is merely to alter the hours of closing on Christmas Day and Good Friday, and to apply the Sunday closing hours to those days.

[He was stopped.]

POLLOCK, B. I am clearly of opinion that this conviction must be quashed. The history of the law on this point may be shortly stated thus: before the Welsh Act the law was founded on the Licensing Acts of 1872 and 1874, which dealt with the hours during which licensed houses might be open. The 49th section of the earlier Act dealt with six-day licences, which necessarily involved closing on Sunday, while s. 24 of that Act limited the hours for opening on Sunday. By s. 3 of the Act of 1874 the hours of closing were varied, and the hours named in the early part of the section as the Sunday closing hours were to apply to Christmas Day and Good Friday. This being the state of the law, the Welsh Act of 1881 was passed. That Act contains no interpretation clause defining the meaning of Sunday, nor is it directed to be read together with the Acts of 1872 and 1874; the word "Sunday" must therefore have its ordinary meaning, and I am of opinion that it was used to have the effect of altering the Sunday hours by closing licensed houses entirely on that day. The 2nd section of the Act of 1881 does not apply; it is only when the house is closed under that Act (which is not the case here) that the Licensing Acts of 1872 and 1874 are to apply.

NORTH, J. I agree. The meaning of the Act of 1881 seems clear from the words themselves; Sunday business, which previously had been confined within limited hours, was altogether prohibited. The words in the 2nd section "premises closed under this Act" only apply to premises which before were closed during a portion of Sunday, but by that Act are altogether closed; there is no ground for attributing any other meaning to them. A second point has been ingeniously argued, that the 3rd section of the Act of 1874, taken in connection with the 49th section of

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the Act of 1872, makes Christmas Day and Good Friday follow the rule as to Sunday. But I think the words at the end of the 3rd section, on which so much reliance has been properly placed, simply have the effect of defining the hours during which licensed houses may be opened on those days.

Judgment for the appellant.

Solicitors for appellant: *Smith & Lawrence.*
Solicitor for respondent: *John Thomas, Swansea.*

J. R.

April 3.

WILLIAMS, APPELLANT; DAVIES, RESPONDENT.

Bastardy—Order for Payment until the Child attains the age of Thirteen or the Mother marries—Marriage of Mother—Power of Justices to make second Order after death of Husband.

Upon the hearing of an affiliation summons the justices made an order under 35 & 36 Vict. c. 65, for the payment of a weekly sum until the child should attain the age of thirteen years or die, or the mother should marry. The mother married, and her husband died before the child attained the age of thirteen. The mother took out a fresh summons upon which the justices made an order for payment of a weekly allowance:—

Held (Hawkins, J., doubting), that the matter was res judicata, and the second order was bad.

CASE stated by justices.

The facts, so far as they are material, were as follows:—

On the 2nd of April, 1875, subsequently to the passing of 35 & 36 Vict. c. 65, on an affiliation summons taken out by Catherine James, the respondent (then a single woman), justices in petty sessions made an order on the appellant, the putative father, for payment of two shillings a week until the child should attain the age of thirteen years or die, or the said Catherine James should marry.

In May, 1879, the respondent married John Davies. The appellant regularly made the weekly payments under the order until September, 1880, when he discontinued them. John Davies died on the 21st of September, 1881.

In 1882 the respondent obtained a fresh affiliation summons against the appellant, which was heard on the 3rd of November.

At the hearing it was contended on behalf of the appellant that the mother having obtained one valid order which had ceased upon her marriage, the matter was res judicata, and the justices had no power to make a second order; and further, that the payments made by the appellant within twelve months after the birth of the child were not voluntary payments such as were contemplated by s. 3 of the Bastardy Laws Amendment Act, 1872. The respondent contended that, as the justices had in their discretion limited the first order for a shorter period than the extreme period allowed by the Act of 1872, it was competent for the mother, at the expiration of that shorter period, to make a fresh application if she were still unable to maintain her child. It was further contended on her behalf that s. 3 of the Act of 1872 did not contemplate voluntary payments only, and that the payments made by the appellant under the first order within twelve months of the child's birth were payments within the meaning of that section.

The justices adjudged the appellant to be the putative father of the child, and ordered him to pay to the respondent the sum of two shillings per week until the child should attain the age of — (1) years or die.

The question for the Court was whether the justices were correct in point of law.

Bosanquet, Q.C., for the appellant.

No one appeared for the respondent.

DENMAN, J. The order made in this case by the justices appears on its face to be not very well framed, but the ground of appeal is that no such order could be made at all, because on a previous occasion an order had been made on the putative father ordering him to pay a certain sum per week until the child attained the age of thirteen years or the mother married. It appears that the mother married, but her husband died. Thereupon a fresh order, which is now appealed from, was made, that a certain sum per week should be paid by the putative father, the

(1) The age was not stated in the order.

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order not saying for what time the payments should be made. Looking at the terms of the statute, and endeavouring to collect the intention of the Legislature therefrom, I think that it was never intended that where the mother had once made an application, and an order had been made on the putative father, it should be open to the mother at some future period to obtain another order again adjudicating upon the case, and get an allowance extending beyond the time named in the original order. Many arguable points have been raised as to the interpretation to be placed on the various Bastardy Acts. In *Reg.* v. *Machen* (1), it was held that where the mother failed in the first instance to obtain an order there had not been a final adjudication as to the paternity of the child so as to prevent the mother from applying again. This proposition was doubted by Lush, L.J., in *Reg.* v. *Gaunt* (2); but it must be taken to be law that such a thing could not be; and it cannot now be contended that the dismissal of such a summons is an adjudication.

Another case of more importance has since been decided, and it was expressly held in *Pearson* v. *Heys* (3) that an order for maintenance until the child be sixteen years old, or the mother marry, was a good order. Now the first of the orders in the present case is identical with the order in that case, and is therefore good. But what we have here to decide is whether the mother, after her husband's death, can apply de novo and obtain a fresh adjudication for payment for the period subsequent to her marriage. Looking at the scope of the Act it seems quite clear that the legislature did not contemplate any such thing. It must not be taken that I base my decision upon the maxim, "nemo debet bis vexari pro eâdem causâ," for here the orders are not made in eâdem causâ for all purposes. But the maxim applies to this extent, that the Act must not be taken to intend a series of operations if it appears only to deal with one application. Looking at the 3rd, 4th, and 5th sections of the Bastardy Act of 1872, it seems to me impossible to say that the Legislature ever contemplated the repetition of an order on the father for payment of an allowance, and to hold otherwise would be doing violence

(1) 14 Q. B. 74. (2) Law Rep. 2 Q. B. 466.
(3) 7 Q. B. D. 260.

to the plain intention of the Legislature. The 5th section deals with the time during which orders made under the Act are to run. At first sight it seems difficult to construe it as authorizing an order for payment until the marriage of the mother, but that point has already been decided, and we sitting here are bound by that decision. But I am clearly of opinion that after the justices have once adjudicated upon the case it is not competent for the mother to ask, so to speak, for an extension of the order. The decision of the justices in this case was wrong, and the appellant is entitled to succeed.

FIELD, J. I am of the same opinion. The question for our decision arises under a case stated by justices in a very informal way; we are asked whether the justices were right in point of law, but they do not tell us what point of law they decided. In my judgment this order is invalid. The statute provides relief for women who become the mothers of bastard children. The first question to be decided is, who is the father? Having adjudicated on that point, the statute provides that the justices may, if they see fit, make an order for the payment of a weekly sum to the mother. The 4th section gives no limit in point of time for the duration of the order; but the 5th section says that no order shall continue in force after the child has attained the age of thirteen, provided that the justices may order the payments to continue until the child is sixteen. There is no limitation as regards the marriage of the mother, and this silence is most remarkable, because in the Act of 1844 there is an express provision for the determination of the order in that event. It is clear, however, that the justices may limit the duration of the order in point of time, say to four, six, or ten years. Can they then bar their discretion in the future, and say that if the mother marries the payments shall come to an end? I should myself have entertained a doubt, but there is the decision of a Court upon the point, and I act upon it. Could it be competent to the justices on a second investigation to find that the man was not the putative father? for this must be so, if their original jurisdiction is not exhausted by the first order. It is clear that this was never intended at all, and I am of opinion that the statute only

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intended that one application should be made, and one order made once for all. Another point has been raised in this case, upon which, however, it is unnecessary for us to give any decision. Reference was made to the opinion expressed by my Brother Manisty in *Pearson* v. *Heys*. (1) In that case the learned judge, commenting upon the 3rd section of the Act which provides that the mother may take out a summons more than twelve months after the birth of the child, if the father of the child has within twelve months next after its birth paid money for its maintenance, suggested that, where a bastardy order is made and money paid under it within twelve months from the birth of the child, the mother might, at the end of the period mentioned in the order, come again for another order. Upon that point I entertain very great doubt indeed, and am inclined to think that that would not be a payment within the meaning of the Act of 1872.

HAWKINS, J. It would have been more satisfactory if this case had been argued on behalf of the respondent. I entertain considerable doubt upon it.

Order quashed.

Solicitors for appellant: *Griffith Jones, for Griffith Jones & Co., Aberystwith.*

(1) 7 Q. B. D. 260.

J. R.

ABRATH *v.* THE NORTH EASTERN RAILWAY COMPANY.

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April 20.

Malicious Prosecution — Reasonable and Probable Cause — Onus of Proof — Direction to Jury.

In an action for malicious prosecution, where the plaintiff makes out a primâ facie case, and the judge, in order to enable himself to determine the issue of reasonable and probable cause, leaves subsidiary questions of fact to the jury, the onus of proving the existence of such facts as tend to establish reasonable and probable cause lies upon the defendant.

Reversed in appeal 11 QBD 440. CA

ACTION for malicious prosecution.

At the trial, before Cave, J., and a jury at the Durham summer assizes, 1882, the following material facts were proved in evidence or admitted:—

The plaintiff, a doctor, had attended one McMann for personal injuries alleged to have been sustained in a collision between two trains upon the defendants' railway. McMann brought an action against the defendants to recover compensation in respect of these injuries, and upon the action coming on for trial at the Newcastle summer assizes, 1881, a compromise was effected by the defendants agreeing to pay McMann a large sum by way of damages and costs. Subsequently the defendants, acting upon information obtained as the result of inquires they had caused to be made, resolved to prosecute Dr. Abrath, the plaintiff in the present action, for a conspiracy with intent to defraud. An information was accordingly laid before certain justices of the county of Durham, who committed Dr. Abrath for trial. He was tried at Durham winter assizes, 1882, and acquitted, and thereupon commenced the present action against the defendants.

Upon these facts Cave, J., left three questions to the jury: 1. Did the defendants in prosecuting the plaintiff take reasonable care to inform themselves of the true state of the case; 2. Did they honestly believe the case which they laid before the magistrates; and, 3. Were the defendants actuated by any indirect motive in preferring the charge against the plaintiff.

With respect to the two first questions the learned judge directed the jury that, if they answered them in the affirmative, then the defendants had reasonable and probable cause for the

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prosecution, and were entitled to a verdict, and he further directed the jury with respect to those two questions that the onus of proving that the defendants did not take reasonable care to inform themselves of the true state of the case, and did not honestly believe the case which they laid before the magistrates, lay upon the plaintiff.

The jury answered the two first questions in the affirmative, but gave no answer to the third question, and Cave, J., thereupon directed a verdict to be entered for the defendants, and gave judgment for them.

The plaintiff obtained a rule calling upon the defendants to shew cause why the verdict and judgment should not be set aside, and a new trial had on the ground of misdirection.

March 17. *Sir F. Herschell, S.G.*, and *Gainsford Bruce* (*Digby Seymour, Q.C.*, and *J. L. Walton*, with them), shewed cause. The learned judge's direction was right. The onus was upon the plaintiff to prove the allegation upon which his cause of action was founded, viz., that the defendants prosecuted him maliciously and without reasonable and probable cause. The jury negatived malice, and there was no evidence given on behalf of the plaintiff upon which they could properly have found against the defendants upon the questions with respect to reasonable and probable cause.

Sir H. Giffard, Q.C., and *McClymont*, supported the rule. It is admitted that the onus of satisfying the judge upon the issue of reasonable and probable cause lies upon the plaintiff. But the plaintiff has discharged himself of that onus when he has made out a primâ facie case of absence of reasonable and probable cause, and where questions of fact are left to the jury in order to enable the judge to determine the issue of reasonable and probable cause, the onus of proof is transferred to the defendant, who must satisfy the judge of the existence of facts which, when proved, shew that the defendant had reasonable and probable cause to prosecute. It is impossible for the plaintiff to negative those facts because they cannot be within his knowledge. In the present case the plaintiff could not know whether the defendants took reasonable care to inform themselves of the true state

of the case, or whether they honestly believed the case they laid before the magistrates.

[The following cases were referred to during the argument:—*Sutton* v. *Sadler* (1); *Scott* v. *London Dock Co.* (2); *Walker* v. *South Eastern Ry. Co.* (3); *Bank of New South Wales* v. *Owston* (4); *Herman* v. *Seneschal* (5); *FitzJohn* v. *Mackinder* (6); *Nicholson* v. *Coghill* (7); *Stevens* v. *Midland Counties Ry. Co.* (8)]

Cur. adv. vult.

April 20. GROVE, J. (after stating the facts). The alleged misdirection in this case was in the learned judge before whom the action was tried stating to the jury that the onus was upon the plaintiff of proving that the defendants did not take reasonable and proper care to inform themselves of the true state of the case in prosecuting the plaintiff, and that they did not honestly believe the case which they laid before the magistrates. The learned judge put the question as to reasonable and proper care and honest belief to the jury for the purpose of informing his own mind with respect to the existence of reasonable and probable cause for the prosecution. It was admitted in argument by the plaintiff's counsel that in most cases—possibly in all where the defence consists of a negation of the plaintiff's case—the onus with respect to issues in the cause rests with the plaintiff. But it was urged that here those questions were not issues in the cause, but questions with respect to subordinate facts bearing upon the existence of reasonable and probable cause. Now, whether or not the defendants had reasonable and probable cause to prosecute the plaintiff was one of the issues in the cause. But with respect to that issue the onus no doubt was upon the plaintiff. That issue could not have been left in a direct form to the jury. In *Panton* v. *Williams* (9) it was held—and the principle of that decision has been followed in many subsequent cases, and re-

(1) 3 C. B. (N.S.) 87; 26 L. J. (C.P.) 284.
(2) 3 H. & C. 596; 34 L. J. (Ex.) 220.
(3) Law Rep. 5 C. P. 640.
(4) 4 App. Cas. 270.
(5) 13 C. B. (N.S.) 392; 32 L. J. (C.P.) 43.
(6) 9 C. B. (N.S.) 505; 30 L. J. (C.P.) 257.
(7) 4 B. & C. 21.
(8) 10 Ex. 352.
(9) 2 Q. B. 169.

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affirmed by the House of Lords in *Lister* v. *Perryman* (1)—that it is for the judge to say whether or not there was reasonable and probable cause, though the jury should be asked to find every fact in dispute which may assist him or he may consider necessary in determining that question. There may perhaps be uncontradicted facts other than those left to the jury, and the judge no doubt may take those uncontradicted facts into consideration, but it was argued for the plaintiff that, where the defendant undertakes to bring forward facts for the purpose of satisfying not the jury but the judge that there was reasonable and probable cause for prosecuting, the onus of proving those facts is upon the person who brings them forward. On consideration I am satisfied that this contention is founded upon a right view of the law. The existence of those facts is presumably known only to the defendant. It is impossible for the plaintiff in an action for malicious prosecution to know what course the defendant took to satisfy himself, or by what means he did satisfy himself, of the probable truth of the information conveyed to him, upon which he determined to prosecute. In the present case the defendants only can know whether, in the words of the 1st and 2nd questions left to the jury, "they took reasonable and proper care to inform themselves of the true state of the case," and "honestly believed the case which they laid before the magistrates." It is true that "honest belief" is a matter in their own minds, but they know the best mode of satisfying the jury upon the facts which induced that honest belief, so that the jury may reasonably draw the inference that the defendants had it. At any rate it is not probable that in the majority of actions for malicious prosecution the plaintiff can know whether the defendants took reasonable care to inform themselves of the true state of the case, or whether they honestly believed in their case. I think, therefore, that the general rule of law should be followed here, which is that the onus rests on the person affirming—the person who for his own purposes asserts facts to the truth of which he pledges himself. It is somewhat singular that there is no express authority on the point. Cases were cited in argument, but none of them appeared to bear on the actual question we have

(1) Law Rep. 4 H. L. 521.

to decide, and it is therefore unnecessary to make further mention of them. I am of opinion that this was not one of those cases in which the question of onus would probably have but a slight effect upon the minds of the jury in inducing them to come to a conclusion. It is to be observed that in several passages of the summing-up the learned judge put to the jury the question of honest belief in the minds of the defendants, both as applying to reasonable and probable cause and to malice, and it seems clear that the jury answered the first two questions left to them at the end of the case as applying to the issue of reasonable and probable cause apart from the issue of malice. They answered the first two questions in the affirmative upon the express direction that the onus lay upon the plaintiff to prove that the defendants did not take reasonable care to inform themselves of the true state of the case, and did not honestly believe the case they laid before the magistrates, but the jury were disinclined or unable to answer the 3rd question as to malice. Under these circumstances, and looking at the course the case took at the trial with respect to the non-calling of witnesses by the defendants and other matters, I cannot avoid coming to the conclusion that a substantial miscarriage may have been caused by the misdirection, and therefore that the Court cannot act under the power given by Order XXXIX., rule 3, and save the expense of a new trial by discharging this rule. I am therefore of opinion that this rule must be made absolute.

LOPES, J. I have considered with my Brother Grove the judgment he has delivered, and I entirely concur in it.

Rule absolute.

Solicitor for plaintiff: *J. Balfour Allan, for W. M. Skinner, Sunderland.*

Solicitors for defendants: *Williamson, Hill & Co., for G. S. Gibb, York.*

W. A.

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March 17.

LEEDS AND COUNTY BANK, LIMITED *v.* WALKER.

*Bank of England—Note—Material alteration—Bonâ fide transfer for value—Rejection by Bank—*45 *&* 46 *Vict. c.* 61 (*Bills of Exchange Act*, 1882), *ss.* 64, 89—*Worthless Document—Action for money paid to Transferror.*

A Bank of England note, which had been materially altered in number and date, was paid to the plaintiffs' bank for value by the defendant, both parties believing the note to be good. The plaintiffs paid away the note, which was afterwards presented at the Bank of England, where the alteration was perceived and payment was refused. The note was returned to the plaintiffs as a bad one, and, after a fortnight spent in tracing the note to the defendant, the plaintiffs demanded payment of it from him, and on the 21st of July, 1882, sued him for the amount.

On the 18th of August, 1882, the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), received the royal assent. By s. 64, where a bill or acceptance is materially altered, without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made the alteration, and subsequent indorsers. Provided that where a bill has been materially altered, but the alteration is "not apparent," and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor. By s. 89 the provisions of this Act relating to bills of exchange apply, "with the necessary modifications," to promissory notes:—

Held, that the doctrine as to notice of infirmity in bills and notes was inapplicable to a forged Bank of England note, and that the delay in giving notice of the alteration to the defendant was no ground of defence; that before the Bills of Exchange Act, 1882, the Bank of England was not liable on the altered note: *Suffell* v. *Bank of England* (9 Q. B. D. 555); which was therefore worthless; that s. 64 was not retrospective, and that even if it were so, the "necessary modifications" referred to in s. 89 would exclude Bank of England notes altogether from the operation of s. 64, and that even if the proviso of s. 64 would otherwise have affected the altered bank note, the alteration was "apparent," as the Bank of England could at once discern and point out to the holder of the note that it had been materially altered, although the alteration was not obvious to everybody; and, consequently, that the plaintiffs, having received from the defendant a worthless note on which no one could be sued, were entitled to recover in the action for money had and received.

FURTHER CONSIDERATION by Denman, J.

The facts and arguments appear in the judgment. In addition to the cases therein-mentioned—

Forbes, Q.C., and *Cyril Dodd*, for the plaintiffs, cited Leake on

Contracts, p. 897; *Cox* v. *Prentice* (1); Wilberforce on Statutes, p. 157; *Hitchcock* v. *Way* (2); *Durrant* v. *Ecclesiastical Commissioners.* (3)

A. Wills, Q.C., and *W. Gainsford Bruce*, for the defendant, cited *Clough* v. *London and North Western Ry. Co.* (4); *Turner* v. *Stones* (5); Byles on Bills, 13th ed. 214; *Ex parte Bird. In re Bourne.* (6)

DENMAN, J. This case came on to be tried before me without a jury at the last Leeds Assizes. The facts were then stated and agreed to, and it was arranged that I should hear the case argued in London, which I did last week. The facts were as follows: In 1879 and 1880 the plaintiffs, who were a banking company carrying on business at Leeds, had a customer named Dickenson, a provision dealer at Leeds. In December, January, and February, 1880, he paid in to his account three bills of exchange for 65*l.*, 40*l.*, and 50*l.* respectively, accepted by one Wilson. These were credited by the plaintiffs to Dickenson's account. On the 30th of March, 1880, Wilson paid 20*l.* on account of the first of these bills, leaving 135*l.* still due from him as acceptor. On the 2nd of April, 1880, Dickenson filed a petition for liquidation. All the bills were dishonoured, and the bank applied to Wilson as acceptor for payment of the bills. A few days before the 29th of May, 1880, the defendant Walker, a solicitor, sent his clerk to the plaintiffs' bank and asked for a little time for Wilson to take up the dishonoured bills, stating, through his clerk, that he, Walker, was arranging for a loan for Wilson to take up his acceptances. On the 29th of May, 1880, the same clerk, acting for the defendant, called at the plaintiffs' bank and gave the the plaintiffs two 100*l.* Bank of England notes, which all parties believed to be good Bank of England notes, and received in exchange the three acceptances (on which Wilson was still liable for 135*l.*) and 63*l.* 15*s.* in cash. One of these notes had been altered both in number and in date. The plaintiffs, on the 29th of May, credited Dickenson's estate in liquidation with the 200*l.*

(1) 3 M. & S. 344.
(2) 6 Ad. & E. 943.
(3) 6 Q. B. D. 234.
(4) Law Rep. 7 Ex. 26.
(5) 1 D. & L. 122.
(6) 4 De G. & S. 273.

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which they supposed they had received. The entry in the plaintiffs' Book of Estates in Liquidation was "29th of May, 1880 By Wilson 136*l.* 5*s.*," and another entry in their books of the same transaction was, "Paid by re C. Wilson, 136*l.* 5*s.*," and on the 1st of June, 1880, they paid the altered note to a building society having an account with them, in exchange for a cheque. On the 17th of June the note in question was brought back as a bad note refused by the Bank of England, and with the words, "The No. and date of this note have been altered," written across the face of it in red ink. The plaintiffs saw on the note a number which shewed that it had passed through the hands of other bankers; but finding an entry in their Bank Note Register of the 29th of May, 1880, "Note received from J. Walker," shewing a customer of that name, they at first made inquiry in that direction, but owing to the absence of that J. Walker abroad, some delay took place before they discovered that he was not the person who had brought the cheque to them. On the 22nd of July they made a demand of the 100*l.* represented by the altered note on the defendant, who then had notice that the note was bad, but declined to make good the amount on the ground to be mentioned presently. The history of the defendant's original possession of the note was as follows: the defendant had another client named Armistead, who was entitled to a sum of 700*l.* from the executors of his father's will. They drew a cheque for that sum on the 1st of October, 1879, on Messrs. Williams, Brown, & Co., bankers at Leeds, payable to Butler & Co., solicitors, or order, who had indorsed it to Armistead. In April, 1880, that cheque had been given to Walker, the defendant, to be cashed; the defendant had presented it to Williams, Brown, & Co., and received the note in question, and the other 100*l.* note as part of the cash for the cheque. Armistead having agreed to lend Wilson 150*l.* to take up his acceptances at the plaintiffs' bank, the defendant then, as before mentioned, paid the cheque in question and obtained the acceptances which he had since kept in his safe. It was admitted by the plaintiffs' counsel on the trial that if the note had been a good one the defendant would have held it merely for the purpose of carrying out the arrangement between Armistead and Wilson. It was also admitted by the defendant that out of the 63*l.* 15*s.*

balance received by him from the plaintiff's bank beyond the acceptances, he appropriated 13*l.* 15*s.* to payment to himself of a bill of costs due from Wilson to him without any communication to Wilson, and that he paid the residue, 50*l.*, to Armistead on the 30th of June, 1880.

These being the admitted facts of the case, the plaintiffs' counsel contended that the plaintiffs had a right to recover back the amount of the note from the defendant Walker, and likened the case to that of *Jones* v. *Ryde* (1), in which it was held that where a person discounted with another a forged navy bill, both parties being ignorant of the forgery, an action for money had and received would lie. *Gompertz* v. *Bartlett* (2) was also cited, in which the same principle was applied to the case of an unstamped bill of exchange purporting to be a foreign bill but drawn in this country, and therefore unavailable for want of a stamp. The general principle laid down in those cases was not disputed; but it was contended that the plaintiffs were not entitled to recover in the present case on several grounds. First, it was argued that the defendant was not liable, because the transaction in question was not one between the plaintiffs and the defendant, but that the defendant acted as the agent either of Wilson or of Armistead in the matter; and that the plaintiffs dealt with him only in one or other of those capacities. I heard a very able argument on both sides as to whether the defendant acted as the agent of Wilson or of Armistead at the several stages of his dealings with the note in question; in originally taking it from Messrs. Wilson & Brown, in taking it to the bank for Wilson, and in receiving the acceptances and money for it from the plaintiffs; but whatever might be the true solution of several of the questions raised, I am of opinion that in the present case there is no evidence which would justify me in holding that the bank dealt with the defendant in the capacity merely of Wilson's agent, of whom they knew nothing except that he was the acceptor of the bills, still less that they dealt with him as Armistead's agent, of whom they knew nothing. All that concerned them was to have cash for the amount of the acceptances, and on the receipt of what they believed to be two Bank of

(1) 5 Taunt. 488. (2) 2 E. & B. 849.

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England notes for 100*l.* each they gave up the acceptances, and cash to the amount of 63*l.* 15*s.* for the balance of the nominal amount of the two notes. I think it is clear that they could not have sued Wilson upon the discovery of the badness of the note; nor Armistead. That particular note for 100*l.*, which was afterwards discovered to be altered, was never so appropriated to Wilson that the defendant might not have paid the money to the plaintiffs in any other shape. There was no privity as regards that particular note between the bank and any other person but the defendant. I think, therefore, that if anybody is liable to the plaintiffs, it is the defendant. But it was contended further that the defendant was not liable, because the bank were guilty of laches in not sooner giving notice to the defendant of the badness of the note, and several cases were cited by Mr. Wills in which parties have been held not entitled to recover in actions on bills and notes on this account. The case of *Camidge* v. *Allenby* (1) was relied upon; but I think that case is clearly distinguishable from the present. There the instruments in question were promissory notes of a bank which had stopped payment on the morning on which the notes were taken. They were kept for some days without notice of the insolvency of the bankers, and the Court held that inasmuch as they were "in point of law promissory notes," and "operated as payment" (2), notice was requisite. In the judgment of Liddledale, J., this is clearly stated (3) as the ground of the decision. "If they were taken as money absolutely and without any condition, then the plaintiff took them for whatever they might be worth. It would be otherwise if they were forged, for then they would not be what they purported to be. But here they were what they purported to be." In the present case it was admitted that the note in question having been altered in a material part for some fraudulent purpose was in law a forgery, and that subject to any alteration in the law created by the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), or to the effect of that Act upon the decision of the Court of Appeal in *Suffell* v. *Bank of England* (4), it was an instrument upon which no action could be brought

(1) 6 B. & C. 373.
(2) See per Holroyd, J., 6 B. & C. 384.
(3) 6 B. & C. 385.
(4) 9 Q. B. D. 555.

against the Bank of England. Other cases were relied upon by the defendant as to the necessity of giving notice of the infirmity of the note or bill, in order to enable a plaintiff to take advantage of such infirmity; but I think none of them were applicable to the case of a forged Bank of England note upon which no other person can be liable except the bank itself, and in the case of which there is nothing to prevent the person sued for the money paid in error from suing the person to whom he may have given cash in error, and so on ad infinitum, subject only to the Statute of Limitations. *Smith* v. *Mercer* (1) was decided on grounds wholly inapplicable to the case of a forged Bank of England note. Dallas, J., concludes his judgment thus: "The ground on which I rest my opinion, and to which I wish to confine it, is the want of due caution in having paid the bill, the effect of which has been to give time to different parties, which the plaintiffs were not authorized to do;" and Heath, J., and Gibbs, C.J., give similar reasons for their judgments. Chambre, J., dissented from the majority, thinking that the case fell within the general law, which is thus stated by Heath, J., at p. 86 of his judgment, "that money paid without consideration upon an instrument which proves to be of no value may be recovered back." *Cocks* v. *Masterman* (2), again, was decided solely on the ground that the neglect to give notice of the forgery on the day on which the bill became due might deprive the holder of his right to take steps against the parties to the bill on the day on which it became due, a ground wholly inapplicable to the case of a Bank of England note on which the bank alone is liable (if any one is), but which, if forged, is a mere nullity unless made available for any purpose by the statute to be now referred to. That statute is the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), and it is contended that that Act has virtually overruled the decision of the Court of Appeal in *Suffell* v. *Bank of England* (3), and that notwithstanding the refusal of the bank to honour the note in question in June, 1880, it must now be held that at that time they were in law bound to pay the 100*l.*, and that the plaintiffs not having insisted on their right in that respect are either not entitled to

(1) 6 Taunt. 76, at p. 82. (2) 9 B. & C. 902.
(3) 9 Q. B. D. 555.

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recover as upon a failure of consideration, or at all events only entitled to recover nominal damages. Sect. 64 of the Act runs as follows: "Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made . . . the alteration," &c., provided that "where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor."

I think there are several answers to this ground of defence. In the first place the statute in question by s. 2 contains a definition of the words "bill," and "note." The former means "bill of exchange," the latter "promissory note." The Act there contains several provisions relating wholly to "bills" Sects. 3 to 72 inclusive. These constitute part II. of the Act. Then follow ten clauses wholly relating to cheques on bankers. These constitute part III. of the Act. Then follow the provisions of part IV. (ss. 83, 89) headed "promissory notes," and by s. 89, it is provided that the provisions of the Act relating to bills apply with the necessary modifications to promissory notes. It appears to me that this clause was never intended to cover, and has not the effect of covering, such a document as a Bank of England note, altered fraudulently so as to fall within the decision of *Suffell* v. *Bank of England*. (1) Bank of England notes differ in many respects from ordinary promissory notes. They are payable without indorsement to any holder who may present them. They are a legal tender for the amounts represented by them. I think that one "necessary modification" in applying s. 64 of the Act to promissory notes, is a modification amounting to an exclusion of Bank of England notes altogether from the operation of s. 64 of the Act. But, even if this be not so, s. 64 only applies where the alteration is "not apparent." In the present case I think it was apparent. By the word "apparent" I do not think it is meant that the holder only should not have had the means of detecting the alteration. If the party sought to be bound can at once discern by some incongruity on the face of the note, and point

(1) 9 Q. B. D. 555.

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out to the holder that it is not what it was, that is to say, that it has been materially and fraudulently altered, I think the alteration is an "apparent" one, even if it is not an obvious one to all mankind. But I am further of opinion that in the absence of anything in the Act to shew that it is to have a retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to the note in question as it existed in 1880, and down to the time when the present action was brought, viz., the 21st of July, 1882. The Act itself was not passed till the 18th of August in the same year. The defendant had then for two years had the acceptances given up by the plaintiffs in his possession, he had paid over 50*l.* to Armistead of which the plaintiffs knew nothing, and had appropriated 13*l.* 15*s.* to his own bill of costs. At the time when it is alleged the plaintiffs might have sued the Bank of England on the note, the law must be taken to have been as laid down in the case of *Suffell* v. *Bank of England* (1), unless the 45 & 46 Vict. c. 61, s. 64, is to be taken to be equivalent to a declaratory enactment amounting to a declaration that that decision at the time was wrong. I do not find words strong enough to have any such operation. The general principle is clear, that statutes do not have a retrospective operation: (see Maxwell on the Interpretation of Statutes, p. 190). I see no reason for giving s. 64 any such operation in the present case. The case of *Steele* v. *McKinlay* (2) is no authority for so construing that section, for there were words in the Act there in question expressly putting a construction on the words of a prior Act, after a recital that doubts had arisen, and that it was expedient that the meaning of the prior enactment should be declared. The case of *Quilter* v. *Mapleson* (3) was also relied upon for the defendant, but that case was decided solely upon the words of a statute entirely different from that in question, and involved no necessity of giving a retrospective operation to its words, on the contrary, they were held to operate prospectively as regards the particular question which arose upon the appeal which was in the nature of a rehearing in that case. I am of opinion that the law as laid down in *Suffell* v. *Bank of England* (1)

(1) 9 Q. B. D. 555. (2) 5 App. Cas. 754.
(3) 9 Q. B. D. 672.

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by the Court of Appeal, is that which I must hold to be applicable to the present question, and that the plaintiffs, having received the note in question from the defendant, received a worthless document, upon which nobody could be sued, and upon which no other party than the Bank of England could possibly have been held liable, and upon which the defendant may now recover back the amount he has paid upon it as soon as he has paid it to the plaintiffs. On these grounds I think the plaintiffs are entitled to judgment. I give judgment for them for 100*l.* with costs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Nelson, Barr, & Nelson.*
Solicitors for defendant: *Paterson, Snow, & Bloxam.*

J. R.

March 21.

HOPKINSON *v.* LOVERING.

Leaseholds—Bankruptcy of Tenant (Bankruptcy Act, 1869), 32 *&* 33 *Vict. c.* 71 *ss.* 23, 24*—Non-disclaimer after Notice—Assignment by Trustee to Pauper.*

Although a trustee in bankruptcy, who has taken actual possession of leasehold property of the bankrupt, receives notice from the landlord to disclaim the lease under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), but does not disclaim, he may nevertheless relieve himself of liability to the landlord by assigning the lease, even without having previously offered to surrender it, and the mere fact that the trustee knows the assignee to be a pauper will not invalidate such assignment.

FURTHER CONSIDERATION before Denman, J.

The action was tried at Leeds. The facts and arguments appear in the judgment.

In addition to the cases therein referred to,

March 17. *Winslow, Q.C.*, and *J. L. Walton*, for the plaintiff, cited, *Ex parte Emmanuel, In re Batey* (1); *Ex parte Huggins, In re Huggins* (2); *Ex parte Walton, In re Levy* (3); *Ex parte Brook, In re Roberts* (4); *Rowley* v. *Adams.* (5)

(1) 17 Ch. D. 35.
(2) 21 Ch. D. 85.
(3) 17 Ch. D. 746.
(4) 10 Ch. D. 100.
(5) 4 My. & Cr. 534.

Forbes, Q.C., and *Cyril Dodd*, for the defendant, cited, *Ex parte Isherwood, In re Knight* (1); *Wilkins* v. *Fry* (2); *Hanson* v. *Stevenson*. (3)

Cur. adv. vult.

March 21. DENMAN. J. This is an action for two quarters' rent of certain shops and premises at Huddersfield, let by the plaintiff to Platts and Midgley as tenants from year to year at a rent of 300*l.* per annum, and occupied by them as tenants from the 1st of October, 1877, until the 13th of March, 1882, when they filed their petition for liquidation. On the same day the defendant, an accountant in London, was appointed receiver and took possession of the premises, and on the 5th of April he was appointed trustee. A distress for the rent due up to the last quarter-day (the 1st of January), had been put in on the 14th of March, which cleared the rent up to the 1st of January. The defendant continued to occupy the premises and carry on the business for some months, and paid the rent which fell due on the 31st of March, on the 13th of June. On the 14th of June, the plaintiff gave the defendant notice to disclaim the tenancy and not to sever the fixtures. The defendant did not disclaim but remained in possession of the premises, and before the time in which he might have disclaimed, viz., on the 26th of June, executed what purported to be an assignment of the tenancy, as afterwards to be mentioned. Some dispute or difficulty arose with regard to the fixtures, which seems to have created ill-will between the defendant and the plaintiff or his solicitors, and the defendant did not deny that he executed the assignment, partly with the motive of annoying the plaintiff in consequence of the disputes between them. On the 26th of June, the defendant having made up his mind to assign the tenancy, gave a sovereign to one Garrett to become assignee. Garrett was a pauper, and the jury found that the assignment to him was a sham transaction, not intended by him to have the effect which it would appear on the face of it to have, and that the defendant must have known that. On this finding, it was contended that I ought to give judgment for the plaintiff for

(1) 22 Ch. D. 384. (2) 1 Mer. 244.
(1) 1 B. & Ald. 303.

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the whole amount of the claim, viz., 150*l.*, being the rent due for the quarters ending the 1st of July and the 1st of November, respectively (the action having been brought on the 2nd of November). The defendant's counsel admitted that according to *Swansea Bank* v. *Thomas* (1) he was liable to pay 65*l.*, which was agreed to be the apportioned amount of rent due down to the 26th of June, when the assignment to Garrett was executed, but contended that, notwithstanding the finding of the jury, the defendant had a perfect right to get rid of all further liability by assigning as he did, and that the finding of the jury was immaterial. In order to appreciate the effect of the finding, it is necessary to state the way in which the question came to be left to the jury. At the end of the plaintiff's case, Mr. Waddy, for the plaintiff, suggested that certain questions should be asked. The first question suggested was, in substance, whether the defendant had abstained from disclaiming with the view of defeating the plaintiff's claim by assigning to a pauper. This was admitted to be the fact by Mr. Forbes, for the defendant. Mr. Waddy then suggested another question which was not exactly that which I ultimately put to the jury. But before putting any question to the jury, Mr. Forbes called as a witness for the defendant, his solicitor, Mr. Rooks, who swore that before Garrett executed this assignment he explained to him the liability he would incur, and that Garrett said he had nothing to lose, and executed the assignment, and took the key of the premises and gave a receipt for it; and that the defendant had never once occupied the premises. The assignment contained the words "subject to the rent reserved," and I left to the jury the question whether, looking at the liability to pay rent apparently contemplated by the assignment, and at Garrett's utter inability to pay a farthing which must have been known to the defendant, they thought the assignment a real or a sham transaction, to which they gave the answer in the finding in question, saying that they thought it "a sham, not intended by Garrett to have the effect on the face of it, and that the defendant must have understood that."

I abstained at Mr. Forbes' request from giving judgment, in

(1) 4 Ex. D. 94.

order that he might maintain his contention as to the rent claimed for the period after the 26th of June, the date of the assignment. The case was very ably argued before me on the 17th of March by Mr. Winslow and Mr. Walton for the plaintiff, and by Mr. Forbes and Mr. Dodd for the defendant. Before proceeding further, I must say that reading the finding of the jury with my note of what took place at the trial, I am now of opinion that it cannot be taken as meaning that the assignment was not understood by Garrett, as being one which would make him liable, or as one different in effect to what it appeared to be; or such that he could have pleaded non est factum or avoided the assignment on the ground of fraud. All that it seems to me to amount to is that Garrett, though he made himself liable as assignee to the rent, never intended to pay it, and knew that he never would; and that the defendant must have been aware of that. This, in effect, seems to me to be no more than a finding that the defendant assigned the term to Garrett knowing him to be a pauper, and to leave the question where it was upon Mr. Forbes' admission at the trial, that the defendant had assigned to a pauper in order to escape from liability to the rent, and abstained from disclaiming with the view of defeating the plaintiff's claim to rent by assigning to a pauper. On the argument on further consideration, it was argued by Mr. Winslow for the plaintiff that since the Bankruptcy Act, 1869, a completely new code of law has been created, and that if a trustee under notice to disclaim does not disclaim he cannot get rid of his liability by assignment to a pauper; that the relief given to trustees is now confined to the mode pointed out by the statute, and that having neglected to avail himself of this he remains still tenant liable to perform the terms of tenancy. The learned counsel cited several cases, but none of them I think support this contention. On the contrary I think it would be impossible so to hold without acting in violation of the principles laid down in every case in which the subject has been dealt with. In *Ex parte Llynvi's Coal and Iron Co., In re Hide* (1), Mellish, L.J., after saying that it is perfectly clear that "s. 23 only applies where there is a disclaimer," proceeds in language which assumes that the trustee may assign to

(1) Law Rep. 7 Ch. 28, at p. 34.

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an insolvent person. In *Ex parte Dressler, In re Solomon* (1) though there are expressions of Brett, L.J., which seem to go the length of saying that if the trustee neglects to disclaim, he must be liable to pay rent for the residue of the lease, I do not think those can be taken to mean that the old right to assign to another, and so destroy the privity of estate between him and the landlord which is the sole basis of his liability, is taken away. In Cotton, L.J.'s judgment in the same case it is put thus (2): "The power not having been exercised by the trustees in the mode prescribed, they remain liable for the rent *as they would have been under the old law.*" In the case of a contract, not of tenancy but, involving some other onerous obligations, the Court of Appeal held that the provisions of the Act *have not altered the state of the law* affecting a bankrupt's contract unless the trustee disclaims (*In re Sneezum, Ex parte Davis* (3) per Baggallay, L.J.) Again, in *Wilson* v. *Wallani* (4), though the trustee was held liable for want of disclaimer, Stephen, J., in his judgment accepts the view (5) that the principle of the cases since the Statute of 1869, is "that the scope of s. 23 is not to be extended by implication, and that the trustee is to have the same rights and liabilities as the assignees had before him, unless they are altered by express words." In *Titterton* v. *Cooper* (6), Cotton, L.J., states the liability of the trustee as follows (7): "Like every other assignee, he becomes liable for the rent and for the performance of the covenants during the time that the lease is vested in him." In the very case of *Swansea Bank* v. *Thomas* (8), relied upon by the plaintiff for his claim to the apportioned rent, it never appears to have been suggested that the assignment was invalid merely on the ground that, since the Act, disclaimer was the only mode of getting rid of the liability to the rent open to the trustee. On the whole I am of opinion that there is no ground for the contention that the Act of 1869 has deprived the trustee of the right to get rid of his liability to the rent and covenants of a lease by assigning it over at any time, even though he may not

(1) 9 Ch. D. 252.
(2) 9 Ch. D. 252, at p. 259.
(3) 3 Ch. D. 463, at p. 476.
(4) 5 Ex. D. 155.
(5) 5 Ex. D. 155, at p. 162.
(6) 9 Q. B. D. 473.
(7) 9 Q. B. D. 473, at p. 490.
(8) 4 Ex. D. 94.

choose to avail himself of the right to disclaim after notice; nor can I find anything in the Act to prevent him from assigning merely because the notice may have been given, and the time allowed for disclaiming not have elapsed at the time of assignment. But it was said, this assignment was invalid because, independently of the statute, it was in law fraudulent and void as against the landlord. The case mainly relied upon, was *Philpot* v. *Hoare* (1), but that case when examined appears to have proceeded, not upon the ground that an assignment to a pauper was void but, that the assignment relied upon was collusive in this sense, that the apparent assignee was merely to manage the property for the apparent assignor who was to remain the real owner and receive the profits. And the case is explained on that ground by Lord Hardwicke himself in a subsequent page (548) of the same volume of Atkyns' Reports, when he says, speaking of *Philpot* v. *Hoare*, "The great point there was, that the party to whom the assignment was made, or pretended to have been made, acted really as an agent only for the assignor." The case is explained in the same way in *Onslow* v. *Corrie*. (2) Mr. Winslow and Mr. Walton were unable, with all their research, to cite any other case which bore the semblance of an authority that the mere fact of the assignee being a pauper would prevent an assignment from having the effect of destroying that privity of estate, by which alone (as is well explained in *Paul* v. *Nurse* (3)) an assignee or trustee of a bankrupt becomes or remains liable to the rent or covenants of a lease. All the text books lay it down to the contrary; and it is contrary to the general law which is laid down in numerous cases, that an assignment to a beggar is not fraudulent: see *Lekeux* v. *Nash* (4), *Taylor* v. *Shum*. (5) An attempt was made to show that this assignment was bad on the ground that the trustee was bound, before assigning, to have offered to surrender the term to the plaintiff, but I can nowhere find that the neglect to surrender has been held to stop the assignee or trustee from getting rid of the lease by assigning to another party; or to render him liable to rent accruing after he has

(1) 2 Atk. 219.
(2) 2 Madd. 330, at p. 343.
(3) 8 B. & C. 486.
(4) 2 Stra. 1220.
(5) 1 Bos. & P. 21.

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destroyed the privity of estate in respect of which alone such liability exists. For these reasons I am of opinion that, except as regards 65*l.* (which it was admitted fell within the authority of *Swansea Bank* v. *Thomas* (1)), the plaintiff cannot recover, inasmuch as his claim could only rest upon privity of estate, which was destroyed by the assignment to Garrett of the 26th of June. With regard to costs, I do not think that the case of *Parker* v. *McKenzie* (2) has any application to the present case. The allegations of fraud in the present case are not charges of personal fraud, but merely in the nature of assertions that the facts to be proved amount in law to fraud. Inasmuch as the defendant up to the time of trial contested the whole claim and paid nothing into Court, I think that the plaintiff is entitled to the general costs of the cause, and to the costs of the trial so far as they were occasioned by the defendant putting him to the proof of the 65*l.*, but that the defendant is entitled to the costs so far as they are due to the proof of the assignment, and the establishment of his non-liability for rent accruing after the 26th of June. And that the defendant is entitled to the costs of the argument on further consideration. I therefore give judgment for the plaintiff for 65*l.*, and that the costs be paid and borne by the parties respectively as above explained.

Judgment for the plaintiff.

Solicitors for plaintiff: *Peace & Co.*
Solicitors for defendant: *Rooks & Co.*

(1) 4 Ex. D. 94. (2) Law Rep. 10 Ch. 96.

J. R.

SPACKMAN AND ANOTHER *v.* FOSTER. 1883 *April* 7.

Conversion—Demand and Refusal—Statute of Limitations—Title Deeds.

Title deeds of the plaintiffs' were fraudulently taken from them and deposited by a third person, without their knowledge, with the defendant in 1859, who held them without knowledge of the fraud to secure the repayment of a loan. The plaintiffs on discovering the loss of the deeds in 1882, demanded them of the defendant and upon his refusal to give them up brought an action to recover them, to which the defendant pleaded the Statute of Limitations:—

Held, that until demand and refusal to give up the deeds to the real owners they had no right of action against which the statute would run.

THIS was an action tried at the Cambridge Assizes on the 1st of February, 1883, to recover certain title deeds.

At the trial it appeared that the plaintiffs were jointly entitled to certain land at Cottenham, in the county of Cambridge, the title deeds of which were in their possession up to October, 1859. At that date John Spackman, a son of one of the plaintiffs, deposited the deeds without their knowledge with the defendant to secure an advance of 100*l*.

John Spackman died in 1874, having up to that time paid the interest on the mortgage money, which was paid after his death by his widow. The plaintiffs were not aware that the title deeds had been taken from them until April, 1882, when, on the land being advertised for sale, the defendant gave notice that he held the title deeds and claimed to hold them as security. The plaintiffs thereupon demanded them, and, on the refusal of the defendant to give them up, this action was brought. The defendant pleaded the Statute of Limitations, but the learned judge at the trial ruled that the deposit by John Spackman in 1859 gave no title to the defendant against the plaintiffs, and that the Statute of Limitations did not then begin to run and afforded no defence to the action. A verdict was accordingly directed for the plaintiffs. A rule nisi for a new trial was subsequently obtained on the ground of misdirection.

April 5, 1883. *Lumley Smith, Q.C.*, and *Horace Brown* (*Cockerell*, with them), showed cause, and contended that the receipt of the

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title deeds by the defendant was not a conversion by him, and consequently gave no right of action to the plaintiffs, so that the statute only ran from the date of the demand and was no answer to the action. They cited on this point *Wilkinson* v. *Verity*. (1)

Philbrick, Q.C., and *R. V. Williams*, in support of the rule, contended that the case against the defendant was one of tort, and that he had committed no fresh tort since 1859, and consequently whatever period of limitation was applicable the claim was barred. Demand and refusal are not necessary to make an act tortious, they are only evidence that it is so, nor was knowledge of the wrongful nature of the claim essential. The defendant was holding these deeds, and his action in doing so was hostile to the plaintiffs and the statute ran against them. They cited *McCombie* v. *Davies* (2); *Bryant* v. *Herbert*. (3)

Cur. adv. vult.

April 7. GROVE, J. This was an action brought by the two plaintiffs, who were owners of certain real property, to recover possession of their title deeds. It appears that for a long time they had no occasion to refer to the title deeds, but that when inquiry was made for them they were found to be in the possession of the defendant, of whom they were demanded, but who refused to give them up. An action was commenced to which the defendant pleaded the Statute of Limitations. The judge at the trial decided in favour of the plaintiffs that the statute had not run against them, but that they were entitled to the deeds, and they accordingly obtained judgment. Afterwards a rule to set aside that judgment was obtained on the ground that the claim was barred by the statute. Several points were raised in argument, but the only one material to our decision is whether the plaintiffs could have brought an action for the detention of the deeds without previously having demanded them. The defendant when he received these deeds had no knowledge that the person who pledged them had no title to them. He kept them as depositee or bailee bound to return them on payment of the money he had advanced. He held them against the person

(1) Law Rep. 6 C. P. 206. (2) 6 East, 538.
(3) 3 C. P. D. 389.

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who had deposited them, but not against the real owner, and non constat that he would not have given them up if the real owner had demanded them. This does not seem to me to be conversion. There was no injury to the property which would render it impossible to return it, nor claim of title to it, nor claim to hold it against the owner. The defendant was somewhat in the position of a finder of lost property, and the trover or finding is innocent unless it is followed by conversion. The case most relied on for the defendant was *McCombie* v. *Davies*. (1) The headnote of that case certainly appears to support the defendant's argument, but there is the great distinction that there there was a demand and refusal. Lord Ellenborough says that assuming to oneself the property and right of disposing of another man's goods is a conversion, but that was not the case here, for all that the defendant assumed was the right of safe keeping against the person depositing till the amount advanced should be repaid, but he did not in any other respect assume to himself the right of disposing of another man's goods which Lord Ellenborough said would amount to conversion. The other judges assented, but the ground of their opinion is added, "that when the defendant was afterwards informed of the plaintiff's rights and the tobacco was demanded of him he refused to deliver it." On the whole, I think that there was no conversion, and consequently no right of action against which the statute would run till the demand and refusal to give up the deeds. Consequently the ruling of the learned judge at the trial was right, and this rule must be discharged.

STEPHEN and DAY, JJ., concurred.

Rule discharged.

Solicitors for plaintiffs: *Dubois & Reid, for Ellison, Burrows, & Freeman, Cambridge.*

Solicitors for defendant: *Field, Roscoe, & Co., for Fosters & Lawrence, Cambridge.*

(1) 6 East, 538.

A. M.

1883
April 24.

[IN THE COURT OF APPEAL.]

WALL *v.* TAYLOR.
WALL *v.* MARTIN.

Copyright—Musical composition—Dramatic piece—Place of dramatic Entertainment—3 & 4 Wm. 4, c. 15, ss. 1, 2—5 & 6 Vict. c. 45, ss. 20, 21.

12 BDS

The 3 & 4 Wm. 4, c. 15, s. 1 gives the author of a dramatic piece not printed or published the sole liberty of representing it at any place of dramatic entertainment, and s. 2 enacts that if any person shall, during the continuance of such sole liberty, without the consent of the author, represent such piece at any place of dramatic entertainment, "every such offender" shall be liable for each and every such representation to the payment of not less than 40*s.* or to the full amount of the benefit arising from such representation or the loss sustained therefrom, whichever shall be the greater damages.

The 5 & 6 Vict. c. 45, by s. 20, enacts that the 3 & 4 Wm. 4, c. 15, shall apply to musical compositions, and that the sole liberty of representing any dramatic piece or musical composition shall be the property of the author and his assigns for the term then mentioned, and by s. 21 enacts that the person who shall have such sole liberty of representing such dramatic piece or musical composition, "shall have and enjoy the remedies given and provided by 3 & 4 Wm. 4, c. 15, as if the same were re-enacted" in that Act:—

Held, affirming the judgment of the Queen's Bench Division (Cotton, L.J., dissenting), that the person whose right under s. 20 of 5 & 6 Vict. c. 45, to such sole liberty of representing a musical composition, has been infringed, is entitled to recover the penalty of 40*s.* given by s. 2 of 3 & 4 Wm. 4, c. 15, although such musical composition has not been represented at a place of dramatic entertainment.

APPEAL by the defendant Taylor, and also by the defendant Martin, from the judgment of the Queen's Bench Division in the action by the plaintiff Wall against each of these defendants. (1)

In each of these actions the plaintiff sued for the infringement of his right to the sole liberty of representing or performing a musical composition called "Will o' the Wisp," and claimed as damages 40*s.* or "the full amount of the benefit and advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever should be the greater damages." In the action against Taylor the composition or song was sung or represented by the defendant at a public concert

(1) 9 Q. B. D. 727.

held at a place called Bolingbroke Hall, near Clapham Junction, and in the action against Martin the song was represented at the Central Schoolroom at Barton Brow, Over Darwen, Lancashire. The actions were tried before Day, J., at the Trinity sittings at Westminster 1882, when it was admitted on the part of the defendants that the song was a musical composition in respect of which the plaintiff had the right to the sole liberty of representing or performing, within the meaning of 5 & 6 Vict. c. 45, s. 20, but it was denied that the song was a dramatic piece, or that the place where it was sung was a place of dramatic entertainment within the meaning of 3 & 4 Wm. 4, c. 15, s. 2, and therefore it was contended that the plaintiff was not entitled to recover the penalty given by that enactment. The learned judge directed the jury that if the place at which the song was represented or caused to be represented by each of these defendants was not a place of dramatic entertainment, the plaintiff was not entitled to the penalty given by the statutes, but that the jury might award him such damages as he had sustained by the infringement of his copyright. The jury accordingly found a verdict for the plaintiff for 1*s.* damages in each action, and the learned judge ordered the plaintiff to pay the defendants' costs.

A rule nisi for a new trial was afterwards obtained by T. T. Fillan for the plaintiff on the ground of misdirection and of the verdict being against the evidence. The Queen's Bench Division being of opinion that the right of performing musical compositions given by 5 & 6 Vict. c. 45, ss. 20, 21, was not confined to the right of performing them in places of dramatic entertainment, held that the plaintiff was entitled to a verdict for 40*s.* in each action, and that, as a new trial was not necessary, entered judgment for the plaintiff for that amount in each action with costs.

The defendants appealed.

J. Fox (*Cripps*, with him), for the defendant Taylor, and *Wilberforce*, for the defendant Martin.

T. T. Fillan for the plaintiff.

The arguments are sufficiently stated in the judgment of Brett, M.R.

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The following authorities were referred to: *Russell* v. *Smith*. (1) The observations of Willes, J., in *Wolverhampton New Waterworks Company* v. *Hawkesford* (2), on the three classes of cases in which a liability may be established by statute, and *Novello* v. *Sudlow* (3); *Adams* v. *Margate Pier Company* (4); *Chatterton* v. *Cave* (5). (6)

(1) 12 Q. B. 217.

(2) 28 L. J. (C.P.), at p. 246.

(3) 12 C. B. 177; 21 L. J. (C.P.) 169.

(4) Not reported.

(5) 3 App. Cas. 483

(6) The following are the material portions of the enactments 3 & 4 Wm. 4, c. 15, and 4 & 5 Vict. c. 45, relating to the question in these actions.

3 & 4 Wm. 4, c. 15, s. 1, recites the Copyright Act, 54 Geo. 3, c. 156, and declares it expedient to extend the provisions of the said Act. It therefore enacts: "That from and after the passing of this Act, the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed and not printed or published by the author thereof or his assignee, or which hereafter shall be composed and not printed or published by the author thereof or his assignee, shall have as his own property the sole liberty of representing or causing to be represented at any place or places of dramatic entertainment whatsoever in any part of the United Kingdom," &c., "any such production as aforesaid not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof," &c.

Sect. 2, enacts: "That if any person shall during the continuance of such sole liberty as aforesaid, contrary to the intent of this Act or right of the author, or his assignee, represent or cause to be represented without the consent in writing of the author or other proprietor first had and obtained at any place of dramatic entertainment within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than 40s. or the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages to the author," &c. &c.

5 & 6 Vict. c. 45, s. 2, enacts that in the construction of this Act, inter alia, "the words 'dramatic piece,' shall be construed to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment."

Sect. 20, recites 3 & 4 Wm. 4, c. 15, and that it is expedient to extend the term of the sole liberty of representing dramatic pieces given by that Act to the full time by this Act provided for the continuance of copyright, and also that it is expedient to extend to musical compositions the benefit of that Act, and also of this Act. It therefore enacts, "That the provisions of the said Act of His late Majesty and of this Act shall apply to musical compositions and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof and his assignee for the term in this

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BRETT, M.R. The plaintiff in these cases had acquired the exclusive right to a musical composition or song, and was entitled to the sole liberty of representing or performing the same within the meaning of s. 20 of 5 & 6 Vict. c. 45, and it is admitted that the defendants did that which was in derogation of such right. The plaintiff sued for the penalty of 40*s.* in respect of each alleged representation. At the trial the learned Judge held that the penalties could not be recovered, but that the plaintiff might recover damages in each case to the amount to which he had been damaged by the infraction of his right, whereupon the jury gave him as damages 1*s.* in each case; in other words they considered the plaintiff had not suffered any damage at all. Judgment was entered for the plaintiff, but in the exercise of his discretion the learned Judge who tried the action ordered the plaintiff to pay the defendant's costs. The plaintiff appealed to the Queen's Bench Division, and the question there was whether the decision of the learned Judge, that penalties could not be recovered but only damages, was right. The Divisional Court were of opinion that penalties could be recovered, and exercising their power under the Judicature Act, on the ground that they had all the facts before them, they altered the judgment into a judgment for the plaintiff for the penalty of 40*s.* with costs in each case. From that judgment the defendants have appealed to this Court, and it seems to me that this Court is placed in the same position as the Divisional Court, and that we ought to consider what judgment we should give with regard to all the circumstances of the case, the judgment which in our opinion the Divisional Court should have given on the motion for a new trial.

Now the right to the singing of the song in question was exclusively in the plaintiff, but it was sung at what is called a concert and at a place not used on any other occasion as a place for dramatic entertainment. For the plaintiff it was said that the

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Act provided for the duration of copyright in books," &c.

Sect. 21, enacts, "That the person who shall at any time have the sole liberty of representing such dramatic piece, or musical composition, shall have and enjoy the remedies given and provided in the said Act of," &c. (3 & 4 Wm. 4, c. 15) "during the whole of his interest therein as fully as if the same were re-enacted in this Act."

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song was a dramatic piece, and that it was publicly performed or represented, and that therefore he was entitled to the penalty of 40*s*. On the other side it was argued that assuming the song was one to the performance of which the plaintiff had an exclusive right, yet inasmuch as it was sung at a place which was not a place of dramatic entertainment, the plaintiff was not entitled to recover any penalty, but only the amount of such damages as he had thereby suffered. For the plaintiff it is said that his right to the sole representation of the song is given him by s. 20 of 5 & 6 Vict. c. 45, and the remedy he seeks, namely, the right to a penalty, is given by s. 21 of that Act. It is said that s. 21 incorporates the remedy given by s. 2 of 3 & 4 Wm. 4, c. 15, for representing a dramatic piece contrary to that Act; and that it incorporates that remedy only but not the condition or state of circumstances under which the right to the remedy arises. On the part of the defendants it is admitted that 5 & 6 Vict. c. 45, s. 20, gives the plaintiff his right, but they say the remedy given by s. 21 is only that which is given by 3 & 4 Wm. 4, c. 15, s. 2, in respect of a dramatic piece, and where the same circumstances exist as would give the proprietor of such dramatic piece a right to recover a penalty for its representation. In other words the plaintiff says that only part of 3 & 4 Wm. 4, c. 15, s. 2, is incorporated in s. 21 of 5 & 6 Vict. c. 46, whilst the defendants say that the whole of it is incorporated in that section, and consequently that the condition in s. 2 of 3 & 4 Wm. 4, c. 15, that the piece be represented at a place of dramatic entertainment is introduced into s. 21 of 5 & 6 Vict. c. 45, and therefore no penalty was recoverable here, because the song was not sung at a place of dramatic entertainment. This is the point we have to determine. Now the right which is given by 5 & 6 Vict. c. 45, s. 20, is not limited to the representation being at a place of dramatic entertainment. There must, in order to give such right, be a performance or representation, and what would be a performance or representation, must be such according to the ordinary acceptation of those terms. Singing for one's own gratification without intending thereby to represent anything, or to amuse any one else, would not, I think, be either a representation or performance, according to the ordinary meaning of those terms, nor would

the fact of some other person being in the room at the time of such singing make it so; but where to give effect to the song it is necessary that the singing should be made to represent something, or where it is performed for the amusement of other persons, then I think when this takes place it would be a representation or performance. To some extent whether it is such or not must in each case be a question of fact. What was done in the present case was, I take it, a performance or representation by the defendants of a musical composition belonging to the plaintiff, and was therefore an infringement of the plaintiff's right.

Then comes the question whether s. 21 which gives a remedy for such infringement, has introduced the whole of s. 2 of 3 & 4 Wm. 4, c. 15. If it has, so that the right to the penalty is confined to where the representation or performance is at a place of dramatic entertainment, s. 21 will, in reality, be a dead letter, for in ninety-nine cases out of one hundred the proprietor of the musical composition would have no substantial remedy at all for the infringement of his right. That makes one look at the two enactments to see whether the whole or only part of s. 2 of 3 & 4 Wm. 4, c. 15 was intended to be applied to the infringement of the right given by 5 & 6 Vict. c. 45. Now it seems to me, that for the infringement of the right of representing a dramatic piece which is given by s. 1 of 3 & 4 Wm. 4, c. 15, the proprietor has his remedy by action, and that s. 2 of that Act meant to give him a further remedy, that is to say a penalty of 40*s.* for each such representation, or damages amounting to the amount of the benefit from such representation or the loss sustained by the plaintiff whichever should be the greater.

Then 5 & 6 Vict. c. 45, s. 20, gives the exclusive right of representation or performance to the proprietor of a musical composition and for the infringement of such right there would be a right of action. The 21st section which follows, has no introduction of any circumstances under which there is to be a right to a penalty, as in s. 2 of 3 & 4 Wm. 4, c. 15. It does not say "if any person shall," nor does it contain any limitation at all, but it states that the person who shall have the sole liberty of representing such piece or composition shall have and enjoy the remedies given in 3 & 4 Wm. 4, c. 15. The remedy given by

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s. 21 is therefore the 40*s.* penalty or damages, whichever shall be the greater, given by 3 & 4 Wm. 4, c. 15, but the circumstances stated in s. 2 of that Act being omitted in that s. 21, they are not required to be fulfilled in order to entitle the plaintiff to recover the penalty for the infringement of his right. There is a difference between the wording of s. 21 of the Act of Victoria and s. 2 of the Act of William IV. In s. 21 it is not representing any dramatic piece at any place of dramatic entertainment, but only in representing any dramatic piece or musical composition; so that the contingency is altered on which the right to the penalty can be enforced. If indeed a dramatic piece could be performed at any place which was not a place of dramatic entertainment it would alter the right to the penalty given by s. 2 of 3 & 4 Wm. 4, c. 15, but in truth the words "dramatic piece" are words of supererogation, for performing a dramatic piece makes the place where it is performed a place of dramatic entertainment.

I have therefore, come to the conclusion, that the plaintiff ought to recover the penalty and that the judgment in that respect of the Queen's Bench Division was right. Then comes the question whether we should exercise now the same power and to the same extent as the Divisional Court on the rule for new trial. Considering the reasons which must have actuated Mr. Justice Day, in the order he made at the trial, who knew more of the circumstances of the case and of the conduct of the plaintiff than either we or the Divisional Court, I cannot but think that the action ought never to have been brought either for damages or penalties, and that it was an attempt to make money out of what had really not done the plaintiff any harm. Therefore, in my opinion, the right order to make is that the plaintiff recover the penalty of 40*s.* in each action, but no costs either of the action or of this appeal.

With regard to the point made by Mr. Fillan, that even if we should hold the penalty was only recoverable where the performance was at a place of dramatic entertainment, still the plaintiff would be entitled to recover the penalty, as, by reason of the interpretation clause in 5 & 6 Vict. c. 45, a dramatic piece means every musical entertainment, the place where a musical composi-

tion is represented or performed would become a place of dramatic entertainment. I wish to observe that in my opinion that clause cannot be so applied. It is not applicable to each particular composition performed but to the whole concert.

COTTON, L.J. Though I have carefully listened to the judgment of the Master of the Rolls, I regret to say that I am unable to concur in it. The plaintiff has a right to a musical composition, and it is conceded that that right was interfered with by the defendants, and that he has a right of action in respect of such interference, but the question for us to determine is whether he is entitled to recover a penalty of 40*s.* irrespectively of any damages he may be able to prove. It is said that unless he can recover such penalty he will have no adequate protection. I do not agree to that. In my opinion he can have ample protection. He can bring an action for any damages he may really have sustained, and he can have an injunction to protect him against any future infringement of his right. But what he claims is the penalty of 40*s.*, which he says he is entitled to under s. 2 of 3 & 4 Wm. 4, c. 15. Now s. 20 of 5 & 6 Vict. c. 45, which gives the plaintiff his right to the sole representation of the song in question, applies not only to persons entitled to musical compositions but also to persons entitled to dramatic pieces as to whom it extends the time for the continuance of their right. No remedy in terms is given by that section for the infringement of either of those rights, and for the remedy of a penalty of 40*s.* which the plaintiff claims, one must look at s. 21. That section is as follows:—[The Lord Justice here read s. 21.] The remedy of a penalty is only given there by reference to s. 2 of 3 & 4 Wm. 4, c. 15, and as I read that section the recovery of the penalty there given is subject to the existence of the circumstances stated at the beginning, namely, if any person has contrary to the Act represented any piece without the consent of the author at any place of dramatic performance, because it says "every such offender shall be liable for each and every such representation" to the penalty there specified. It is said on the part of the plaintiff that the remedy which s. 21 of 5 & 6 Vict. c. 45, refers to as the remedy for the infringement of the right

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Cotton, L.J.

given by s. 20, begins with the words "every such offender" in s. 2 of 3 & 4 Wm. 4, c. 15; but in my opinion that cannot be the remedy unless you incorporate the condition or circumstances expressed in the beginning of that second section, which are included in the latter part of the section by the word of reference "such." The remedy is not given there except as against the persons who do the things mentioned in the beginning of that section. Therefore, in my opinion, the remedy of the penalty of 40*s.* includes the existence of the circumstances so stated at the commencement of the second section. However the Master of the Rolls, and I believe also Lord Justice Bowen, have taken a different view of the enactment, but if it had rested with me I should have held that although the plaintiff had a right to recover damages he had no right to the penalty of 40*s.* Then as to the plaintiff's right to a new trial on the ground that the place where the song was sung was a place of dramatic entertainment. In support of this the plaintiff has relied on the interpretation clause (s. 2) of 5 & 6 Vict. c. 45, but I agree with the Master of the Rolls that it was not intended by the Legislature to make that a place of dramatic entertainment, which was not otherwise such. As regards granting a new trial on the ground that the verdict was against the evidence, I see no ground for doing so.

BOWEN, L.J. I agree with the Master of the Rolls that the judgment of the Divisional Court should be affirmed, but without costs. The plaintiff is the proprietor of a musical composition, and he claims the protection of the Act 5 & 6 Vict. c. 45, which was expressly passed to protect, inter alia, musical compositions, and he also seeks for the purpose of recovering the penalty of 40*s.* to incorporate so much of the prior Act of William IV. as relates to such penalty, an Act which has nothing to do with musical compositions, and the question is, how much of that Act, which protected dramatic representations only, is to be incorporated in s. 21 of 5 & 6 Vict. c. 45. The plaintiff maintains that s. 21 gives the same penalty for the infringement of the right to a musical composition as is given by s. 2 of 3 & 4 Wm. 4, c. 15, for the infringement of the right to a dramatic piece created by that earlier statute. The defendants, who do not deny

that they are liable to the amount of damage the plaintiff has sustained, contend that they are not liable to the penalty given by s. 2 of 3 & 4 Wm. 4, c. 15, because they maintain that that section is only incorporated in s. 21 of the Act of Victoria to this extent that the penalty is only recoverable when the "condition," as the defendants call it, stated in that second section has been fulfilled, namely, when there has been a representation at a place of dramatic entertainment. The question then is, can the proprietor of a musical composition maintain his claim for the penalty of 40*s.* unless it has been sung or represented at a place of dramatic entertainment? Now I think the answer is this: that what is called in the argument a "condition" of recovering a penalty in s. 2 of 3 & 4 Wm. 4, c. 15, is nothing of the kind, but part of the definition of the offence upon which the penalty is to be incurred; 3 & 4 Wm. 4, c. 15, by s. 1 gave a new property in a dramatic performance, namely, "the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever," a dramatic piece not printed and published. The right granted is the privilege of representing at places of dramatic entertainment. Any one who infringed that right could be sued for damages. Then s. 2 says that if any person shall represent the piece without the consent of the author at any place of dramatic entertainment, (which is only saying in other words if the right given by s. 1 is infringed), the remedy shall be that "every such offender shall be liable for each and every such representation to the payment of an amount not less than 40 shillings." Representing the piece at a place of public entertainment is not a condition precedent of the attaching of the penalty. It is the essence of the offence itself, the very definition of the infringement, which of course is correlative with the definition of the right infringed. Now s. 20 of 5 & 6 Vict. c. 45 creates a new right of property as to a musical composition, and gives the author and his assigns the sole liberty of representing or performing it. That is the right given, and s. 21 says that the person who shall have that right "shall have and enjoy the remedies given and provided" in the Act of 3 & 4 Wm. 4, c. 15. Why read into that word "remedies" that the 2nd section of that Act is only to be put in force, not where there

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Bowen, L.J.

is an infringement of that right, but where there has been a representation or performance at a place of dramatic entertainment? That would be to read into it what is not a condition or limitation of the previous penalty, but merely part of the description or definition of the previous offence. I think that the remedy given was meant to be co-extensive with the right infringed. What pecuniary damage does an author suffer who finds that out of twenty songs sung at a concert one of them is his? Therefore an action for damages would really afford him no protection, neither would an injunction, because it might not be easy to prove that the offender intended to repeat the offence, and what has been sung at one time by one person may be sung afterwards by another person, and the author would never get protection if he could not recover a penalty. I agree, therefore, for these reasons with the Master of the Rolls that the judgment of the Divisional Court should be affirmed, but I think with him that it should be without costs, and that there should also be no costs of this appeal.

Judgment affirmed accordingly.

Solicitor for plaintiff: *J. Lewis Allen.*
Solicitors for defendant Taylor: *Wilkinson & Howlett.*
Solicitor for defendant Martin: *G. Lewis.*

W. P.

THE QUEEN (ON THE PROSECUTION OF THE GUARDIANS OF THE POOR OF GARSTANG UNION) *v.* THE GUARDIANS OF THE POOR OF PRESTON UNION.

1883
March 16.

*Poor—Lunatic Wife—Removal of—Consent of Husband—*25 & 26 *Vict. c.* 111, *s.* 20—*Separation of Husband and Wife.*

A wife, having become insane and chargeable to the union in which her husband dwelt, was taken from his house to the workhouse of the union, and the medical officer thereof certified, under 25 & 26 Vict. c. 111, s. 20, that the lunatic was a proper person to be kept in a workhouse. An order was then made by justices for her removal alone to another union containing her husband's last place of settlement. The husband consented to the removal order; the wife was mentally incapable of consent:—

Held, that the order of removal made under these circumstances did not contravene the policy of the law with regard to the separation of husband and wife, and was good.

RULE calling on the Guardians of Preston Union to shew cause why an order of sessions upon appeal against an order of removal should not be quashed.

On an appeal in which the Guardians of the Preston Poor Law Union were appellants, and the Guardians of the Garstang Poor Law Union were respondents, touching an order of removal from the Garstang Union to the Preston Union, of Margaret, the wife of James Billington, the Court of Quarter Session of Lancashire, holden at Preston, quashed the order with costs, subject to the opinion of the High Court of Justice upon the following Case:—

From August, 1880, to the 7th of July, 1881, Margaret resided with her husband James Billington in his house in the Garstang Poor Law Union, and neither husband nor wife during such time was ever at any time chargeable to or received relief from any parish or union.

On the 7th of July, 1881, she became lunatic and violent, and was, on the application of her husband, taken to the Garstang Workhouse by the relieving officer.

A certificate dated the 11th of July, 1881, was signed by the medical officer of health of the Garstang Union Workhouse under 25 & 26 Vict. c. 111, s. 20, that in his opinion Margaret Billington, a pauper lunatic, was a proper person to be kept in a work-

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house, and that the accommodation of the Garstang Union Workhouse was sufficient for her reception.

The legal settlement of the husband, and of the wife in his right, was, on the 7th of July, 1881, and the 4th of August, 1881, in the Preston Poor Law Union.

On the 4th of August, 1881, two justices of the peace for the county made an order for the removal of Margaret Billington alone from Garstang Union, to Preston Union.

The order (set out in the Case), recited that she was inhabiting the Garstang Union, and chargeable to the common fund thereof in respect of relief made necessary by sickness and unsoundness of mind, being such as would produce permanent disability, and that one of the townships in the Preston Union was the place of her last legal settlement.

The husband consented to such removal. The pauper did not give, nor was she mentally competent to give, her consent.

The husband at the time of such order and thenceforth continued to reside, and then resided, at his house within the Garstang Union, and carried on his employment as theretofore, and maintained himself out of his own funds.

The guardians of the Preston Union appealed to the quarter sessions, and the sessions decided in favour of the appellants on the ground that the wife could not be thus separated from her husband, and that she as a married woman was, under the circumstances, irremovable alone without her husband.

The question was whether upon the facts as above stated, and as in evidence before the quarter sessions, the order of removal appealed against was good in law.

Addison, Q.C. (*Leresche*, with him), shewed cause. The order is bad; a wife cannot be removed from her husband. It is against the policy of the law to separate husband and wife. That is assumed in *Rex* v. *Inhabitants of Ironacton* (1), and *Rex* v. *Inhabitants of Cuckfield* (2); and in *Rex* v. *Inhabitants of Carleton* (3), the Court of Queen's Bench said, "A woman cannot be removed from her husband." In *Rex* v. *Eltham* (4), the husband,

(1) 1 Burr. Sett. Cas. 153.
(2) 1 Burr. Sett. Cas. 290.
(3) 3 Burr. Sett. Cas. 813.
(4) 5 East, 113.

who was Scotch and had gained no settlement in England, consented, and his wife consented to her removal. If consent is material, it must be the consent of both husband and wife. But here the wife was incapable of consent.

In *Rex* v. *Leeds* (1), Bayley, J., said, "It is against public policy and good morals, to permit the separation of husband and wife, even with their consent." Where a husband was a debtor in gaol, the Court of Queen's Bench quashed an order, removing his wife from the parish in which the gaol was situate: *Reg.* v. *Stogumber.* (2) Where husband and wife are living together, and become chargeable, and no settlement of the husband can be ascertained, the wife cannot be removed to the place of her maiden settlement, the husband alone consenting to her separation: *Reg.* v. *Leeds.* (3) Lord Denman, L.J., in that case said that consent of the wife was at all events necessary. The wife here was incapable of consenting. The law as to the settlement of a wife has been lately considered in *Reg.* v. *Guardians of Bridgnorth.* (4)

A. Charles, Q.C., and *J. F. Leese*, in support of the rule. To remove a wife with the consent of her husband to his place of settlement is not contrary to the policy of the law. In the cases cited, the removal was to the maiden settlement of the wife. If both consent, and there is no other settlement than her own, she might, indeed, without any violation of principle, be removed alone to her own settlement. It would seem from *Reg.* v. *Stogumber* (2) that the consent of the husband would have sufficed, but there was nothing to shew that he did consent.

Where the consent of both husband and wife are necessary, the consent of one and the incapacity of the other to consent will be enough. This wife is incapable of consenting, and the consent of her husband alone is sufficient. It cannot be contrary to the policy of the law to separate an insane wife from her husband with his consent. Husband and wife are always separated when the wife is removed to a lunatic asylum. In this case the separation was complete before the removal order was made.

(1) 4 B. & Ald. 498, at p. 501.
(2) 9 Ad. & E. 622; 1 P. & D. 409.
(3) 13 L. J. (M.C.) 107.
(4) 9 Q. B. D. 765.

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POLLOCK, B. Two questions appear in the series of cases cited to us. First, on the policy of the law as to the separation of husband and wife. Secondly, whether, when husband and wife are separated for other purposes, the wife shall be sent to the place of her own settlement, or to the place of her husband's settlement. Some observations by learned judges of earlier days shew that it was considered, in general, wrong to remove the husband from the wife; and in the second class of cases there are some where the wife was sent to her own settlement. In *Rex* v. *Eltham* (1), Lord Ellenborough, C.J., thought that where both husband and wife consented, the wife could be removed to the place of her settlement. In the present case it is not necessary to go so far as that, for this order is to send the wife to the place of her husband's settlement, and by his consent. Therefore any point as to the chargeability of the woman is disposed of. Then comes the important question of public policy. I should agree with the older authorities, and I certainly agree with what was said by Field, J., in *Reg.* v. *Guardians of Bridgnorth* (2), to the effect that it is undesirable to separate husband and wife, and it is the policy of the law not to do so. We have to consider circumstances somewhat, but not quite, novel. They are not quite novel, for in *Reg.* v. *Stogumber* (3), where a husband was confined as a prisoner in gaol under such circumstances that his wife was at liberty to visit her husband, and did so, the question arose whether it was right or proper that she should be removed from him, and it was held by the Court that the order of removal was bad because it would cause the separation of husband and wife. Lord Denman, C.J., said (4): "It is clear in this case that the parties were residing in the same parish, and that there might have been a consortium between them, which it is the policy of the law not to interrupt. No consent on the part of the husband, nor anything equivalent to it, appears on the face of the case." How far that had any effect on the decision of the Court it seems unnecessary now to consider, for the case was put in the argument entirely on the ground that the husband and wife

(1) 5 East, 113.
(2) 9 Q. B. D. 765.
(3) 1 P. & D. 409.
(4) 1 P. & D. 409, at p. 412.

had the means of keeping up consortium. I should think in dealing with such cases now-a-days, that any Court would hold that there could be no consortium where a husband was undergoing a sentence of penal servitude for life. The facts of the present case are that in July, 1881, the wife was taken into Garstang Workhouse, her husband still remaining and working in Garstang, and that on the 11th of July, 1881, a medical opinion was given under 25 & 26 Vict. c. 111, in the prescribed form, and by the proper officer, that the lunatic was a proper person to be kept in a workhouse, and the order of removal was afterwards made. If it be objected to on the ground that the husband has not consented, the answer is that he has consented. To the objection that the wife has not consented, the answer is that she is incapable of consent. So observations in other cases as to the absence of consent do not apply. But this separation of husband and wife is said to be against public policy. Mr. Charles replies that under all circumstances husband and wife are separated when the husband or wife is removed to a lunatic asylum. In the present case it was necessary that the wife should be removed to the workhouse, and she was removed accordingly, and therefore there is no analogy between this case and those in which the policy of non-separation of husband and wife has been discussed.

I think, therefore, that under the circumstances the conclusion of the quarter sessions was incorrect, and that the order of removal must be upheld, and the order quashing it be set aside. The case being one primæ impressionis, we make no order as to costs.

NORTH, J. I agree. Many cases were cited bearing on two questions. One, whether a wife can be removed to her maiden settlement; the other, whether it is against public policy that the consortium of husband and wife should be broken. The facts of this case prevent those questions arising, for here the consortium was put an end to, and the question is whether when the consortium is put an end to the wife shall live at her own or her husband's place of settlement. Her husband's place of settlement is in Preston Union, and to that I think she should be

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removed. Supposing the consortium were put an end to by the death of the husband, in that case the husband's settlement being in Preston Union the wife would be sent there.

Rule absolute.

Solicitor for prosecution: *Clarke, Preston.*
Solicitors for defendants: *Buck, Dicksons, & Cockshott.*

J. R.

June 2.

[CROWN CASE RESERVED.]

THE QUEEN *v.* JONES.

Criminal Law—24 & 25 *Vict. c.* 100, *s.* 57—*Bigamy—Evidence, presumption of continuance of cohabitation.*

The prisoner was convicted of bigamy. It was proved that he had married W. in 1865, and lived with her after the marriage, but for how long was not known; that in 1882, W., being still alive, he had gone through the form of marriage with another woman, but there was no evidence as to the prisoner and W. having ever separated or as to when, if separated, they last saw each other:—

Held, by the COURT (Lord Coleridge, C.J., Pollock, B., Manisty, Lopes, and Stephen, JJ.), that the prisoner was rightly convicted.

THE following case was stated by Stephen, J., for the opinion of the Court.

"Thomas Jones was convicted before me at the last Stafford Assizes on a charge of bigamy.

"It was proved that he was married to Winifred Dodds, on the 13th of March, 1865, and that he went through the ceremony of marriage with Phœbe Jones, on the 11th of September, 1882, Dodds being then alive. One witness said that the prisoner and his wife had lived together after marriage, but how long she did not know. There was no evidence at all as to their having ever separated, or as to when, if separated, they last saw each other.

"In *Reg.* v. *Curgerwen* (1), it was proved that the prisoner and

(1) Law Rep. 1 C. C. R. 1.

his wife had lived apart for many years before the second marriage, and it was held that in that state of facts the prosecution were bound to prove that the prisoner had known that his wife was alive within seven years of the second marriage. As there was no proof that Jones and his wife had ever separated, I thought that *Reg.* v. *Curgerwen* (1) did not apply, and directed the jury to convict the prisoner if they believed he had married a second time in his wife's lifetime.

"He was found guilty, and I sentenced him to two months' imprisonment and hard labour, but suspended the execution of the sentence, and committed him, in default of bail, till this case should be determined.

"The question for the Court is, whether in these circumstances, I ought to have directed an acquittal?"

No counsel appeared.

LORD COLERIDGE, C.J. We are of opinion that this conviction must be affirmed. There is nothing to shew that the parties ever separated so as to bring the facts within the case cited of *Reg.* v. *Curgerwen.* (1) There is proof of the existence of a state of things and no evidence of the cessation of that state of things, consequently, the presumption is that the existing state continued. That presumption could only have been displaced by evidence, and no evidence displacing it was forthcoming.

Conviction affirmed.

(1) Law Rep. 1 C. C. R. 1.

C. D.

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Feb. 20.

[IN THE COURT OF APPEAL.]

PAINE *v.* SLATER.

Mayor's Court—Practice—Execution issued from High Court upon Judgment of Mayor's Court—Mayor's Court of London Procedure Act, 1857 (20 & 21 *Vict. c. clvii.*), *s.* 48—*Borough and Local Courts of Record Act*, 1872 (35 & 36 *Vict. c.* 86), *s.* 6—*Statute, Construction of—Repeal by Implication—Permissive Words.*

By the Mayor's Court of London Procedure Act, 1857, s. 48, execution might be issued in a superior Court upon a judgment obtained in the Mayor's Court. By the Borough and Local Courts of Record Act, 1872, s. 6, where final judgment has been obtained in any local court for a sum not exceeding 20*l.*, "such court shall be at liberty to send a writ or precept for the recovery of the same to the registrar of any county court within the jurisdiction of which the defendant may possess any goods or chattels . . . . and thereupon the high bailiff of such county court shall execute the same in the same manner as if such writ or precept had been issued out of such county court":—

Held, that the two statutes were not inconsistent, and that the Mayor's Court of London Procedure Act, 1857, s. 48, had not been repealed by the Borough and Local Courts of Record Act, 1872, s. 6; and that notwithstanding the latter statute execution might be issued in the High Court of Justice upon a judgment for a sum not exceeding 20*l.* obtained in the Mayor's Court.

In this case judgment was recovered in the Mayor's Court for a sum less than 20*l.*, and was removed into the High Court of Justice pursuant to the Mayor's Court Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 48 (1), and the sheriff levied upon

(1) By the Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), s. 48, "in every case where final judgment shall have been obtained in the Mayor's Court, and also in every case where any rule or order shall have been made by the Court, whereby any sum of money, or any costs, charges, or expenses shall be payable to any person, any writ of execution upon such judgment, or any rule or order so made by the Court, shall be sealed by the sealer of writs of any of the superior Courts, upon a precipe of the same being lodged with him, together with an affidavit verifying the judgment or order, and that the same remains unreversed and unsatisfied, and immediately thereupon such writ of execution and such judgment, rule, or order shall become and be of the same force, charge, and effect as a writ of execution, or judgment recovered in, or a rule or order made by such superior Court, and all the reasonable costs and charges attendant upon such sealing shall be recovered in like manner as if the same were part of such judgment or rule or order."

By the Borough and Local Courts of Record Act, 1872 (35 & 36 Vict.

the defendant's goods. The defendant upon the 19th of September, 1882, applied to Day, J., sitting at chambers, to set aside the fi. fa. issued upon the judgment on the ground that by the Borough and Local Courts of Record Act, 1872 (35 & 36 Vict. c. 86), s. 6, the plaintiff might have, and therefore ought to have, issued a precept to the county court within the jurisdiction of which the defendant had goods, and thus levied the amount due upon the judgment of the Mayor's Court. Day, J., ordered that all proceedings should be stayed upon the defendant bringing into court 20*l.* within a week. The 20*l.* was by the defendant paid into court; but the Queen's Bench Division refused to give him any relief. The defendant then moved this Court that the execution issued on the judgment recovered by the plaintiff against the defendant might be set aside or varied, and that the plaintiff might be ordered to repay to the defendant the costs paid to the plaintiff by the defendant in respect of the removal of the action into the High Court of Justice and all subsequent proceedings thereon.

Proudfoot, for the defendant, in support of the motion. There was no jurisdiction to transfer the execution of the judgment of

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c. 86), s. 6, "In all cases where final judgment shall have been obtained in any action brought in the court wherein the debt or damage does not exceed twenty pounds, exclusive of costs, and also in all cases where any rule or order shall be made by the judge for the payment of any sum of money or any costs, charges, or expenses not exceeding the sum of twenty pounds, such Court shall be at liberty to send a writ or precept for the recovery of the same to the registrar of any county court within the jurisdiction of which the defendant may possess any goods or chattels; and the registrar of such county court shall stamp or seal the same, and thereupon the high bailiff of such county court shall execute the same in the same manner as if such writ or precept had been issued out of such county court, and such high bailiff shall take all the usual and proper fees thereupon, and shall make a return of what he shall have done thereunder to the bailiff or serjeant-at-mace of the court; and in all matters done under such writ or precept or in relation thereto, such high bailiff shall be under the direction and control of the judge of the county court of which he is high bailiff, as if such writ or precept had issued out of such county court: Provided always, that the costs of more than one writ, precept, or warrant shall not be allowed against the execution debtor unless by order of the judge of the said court."

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the Mayor's Court to the High Court of Justice. No doubt power was given by the Mayor's Court Procedure Act, 1857, s. 48, to issue execution from a superior Court upon a judgment obtained in the Mayor's Court; but this power has been taken away by the Borough and Local Courts of Record Act, 1872, s. 6, which directs that where judgment has been obtained in an inferior Court for a sum not exceeding 20*l.*, "the Court shall be at liberty to send a writ or precept for the recovery of the same to the registrar of any county court within the jurisdiction of which the defendant may possess any goods or chattels." It is true that these words are permissive only; but as they relate to the discharge of judicial duties, they must be read as obligatory. The later statute is, therefore, inconsistent with the earlier, which is repealed by implication. Where the amount recovered in the Mayor's Court exceeds 20*l.*, the procedure is now regulated by the Borough and Local Courts of Record Act, 1872, s. 2, and sched. 9, which has been extended to the Mayor's Court by an Order in Council of the 26th of June, 1873, published in the *London Gazette* of the 27th of June.

Richard Nevill, for the plaintiff, was not called upon to argue.

BRETT L.J. The only question before us is whether the Mayor's Court Procedure Act, 1857, s. 48, has been repealed by the Borough and Local Courts of Record Act, 1872, s. 6. The former section is not repealed in express terms; if it is repealed at all, it must be so because it falls within some rule of law whereby a statute is repealed through implication. It is not to be forgotten that the words of the later statute are affirmative and not negative, and that while the Mayor's Court of London Procedure Act, 1857, s. 48, allows execution to be issued from a superior Court upon judgments of the Mayor's Court for any amount, the Borough and Local Courts of Record Act, 1872, s. 6, allows the process of the county court to be put in force only in respect of judgments not exceeding 20*l.* It seems to me that the two statutes are not inconsistent, and that it was intended that the superior Court and the county court should have a concurrent jurisdiction as to judgments for sums not exceeding 20*l.* I think that the Queen's Bench Division were

right in refusing to set aside the execution issued on the judgment recovered by the plaintiff. 1883

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COTTON and BOWEN, L.JJ., concurred.

Appeal dismissed.

Solicitors for plaintiff: *Wetherfield & Son.*
Solicitor for defendant: *W. R. Philp.*

J. E. H.

[IN THE COURT OF APPEAL.]

1879 *March* 4.

Followed. JAMES *v.* THOMAS H. KENT & CO., LTD. [1950] 2 All E.R. 1099.

BRITAIN *v.* ROSSITER.

Frauds, Statute of, s. 4—Contract not to be performed within a Year—Void Contract—Implied Contract—Part Performance—Supreme Court of Judicature Act, 1873 (36 *&* 37 *Vict. c.* 66), *s.* 25, *subs.* 7.

A contract to serve for one year, the service to commence on the second day after that on which the contract is made, is a contract not to be performed within a year within the meaning of the Statute of Frauds, s. 4.

Cawthorne v. *Cordrey* (13 C. B. (N.S.) 406; 32 L. J. (C.P.) 152) distinguished.

A contract, which is not enforceable by reason of the provisions of the Statute of Frauds, s. 4, nevertheless is an existing contract and is not void altogether, and a fresh contract cannot be implied from acts done in pursuance of it.

The doctrine as to part performance, whereby a contract not enforceable by an action at law, owing to the provisions of the Statute of Frauds, s. 4, was rendered enforceable in equity, was confined to suits as to the sale of interests in land, and its operation has not been extended by the provisions of the Supreme Court of Judicature Act, 1873.

Stat Cas 469, 474, 478, 496

ACTION FOR WRONGFUL DISMISSAL.

At the trial it appeared that the plaintiff entered into the defendant's service as clerk and accountant for one year.

The plaintiff and the defendant had interviews upon the 17th, 19th, and 21st of April, 1877. The 21st was a Saturday, and the plaintiff entered upon the defendant's service upon Monday the 23rd. The final arrangement between the parties was arrived at upon the Saturday.

The plaintiff remained some months in the defendant's service and was then dismissed without a three months' notice. The defendant relied upon the Statute of Frauds, s. 4. At the trial

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before Hawkins, J., the verdict was entered for the defendant upon the ground, first, that the contract was made finally upon Saturday, the 21st of April, and being made upon that day was within the Statute of Frauds, s. 4; secondly, that there was no evidence of a new contract on Monday, April the 23rd, it not being proved that the contract made on the previous Saturday was altered or rescinded.

The Exchequer Division having refused a new trial on the ground of misdirection,

1878. May 29. *Firth* moved in this Court, by way of appeal; he contended first, that the contract of service for one year was to begin from Monday, the 23rd of April, and therefore that it was a contract to be performed within a year; secondly, that the plaintiff could not be dismissed without notice, a verbal contract being in existence; thirdly, that the contract having been partly performed, was taken out of the Statute of Frauds, s. 4. As to the first point he cited *Cawthorne* v. *Cordrey*. (1)

BRETT, L.J. It seems to me that this contract is within the Statute of Frauds, s. 4. I take the evidence to be clear in this case; the contract was made on the Saturday, and the terms of the contract were that the plaintiff was to commence his service on the Monday, and to serve for a year from the Monday, and to be paid for a year from the Monday; therefore the contract was not to be performed within a year, and falls within the Statute of Frauds, s. 4. It was contended that *Cawthorne* v. *Cordrey* (1) was contrary to our decision. It seems to me that that case contains two things, one a decision, and the other a dictum. The decision is not against our judgment; for it was that although the parties spoke to each other on a Sunday, there was evidence upon which the jury might find that the contract was made on the Monday, and that that contract was for service for a year from that Monday, and that the service was to be performed within a year from that time. That decision was in accordance with all the other cases. If the contract was made on the Monday, and if the service was to commence on the Monday, it

(1) 13 C. B. (N.S.) 406; 32 L. J. (C.P.) 152.

is obvious that the service was to be performed within one year from the making of the contract. There was, however, a dictum of Willes, J., which seems to be supported by the opinion of Byles, J.; these are great authorities; and that dictum seems to have been that if a contract is made on a day, say Monday, for a service for a year, to commence on the following day, say a Tuesday, the service is to be performed within 365 days from the making of the contract, but that inasmuch as the law takes no notice of part of a day, and the contract was made in the middle of the Monday, the service to be performed within 365 days after that, the law did not count that half day of the Monday, and therefore the contract was to be performed within 365 days after it was made, and that was within a year. This view was founded upon a fiction, namely, that the law does not take notice of part of a day. I am not prepared to say that under like circumstances one might not follow that dictum and carry it to the length of a decision. It is not necessary to say so here, because the case has not arisen. This contract was made on the Saturday, and the service was not to begin until the Monday, that is, not the next day to Saturday, but the day save one after. The dictum does not apply. To say that the Sunday is not to be counted in the year's service would not do, because if one Sunday is not to be counted, no Sunday is to be counted. As to *Cawthorne* v. *Cordrey* (1) the decision is not different from other cases; as to the dictum, we can say nothing about it in this case, because the point does not arise. Therefore we have not to overrule *Cawthorne* v. *Cordrey* (1) either as to its decision or its dictum. I think that the contract falls clearly within the statute and within the principle of *Bracegirdle* v. *Heald.* (2) Therefore no rule will be granted as to the point whether the contract is within the statute; but the plaintiff may take a rule upon the questions whether the operation of the Statute of Frauds, s. 4, may be defeated by part performance, and also whether the plaintiff was entitled to any notice of dismissal, a verbal contract being in existence.

COTTON and THESIGER, L.JJ., concurred.

(1) 13 C. B. (N.S.) 406; 32 L. J. (C.P.) 152. (2) 1 B. & Ald. 722.

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1879. March 4. *J. C. Lawrance, Q.C.*, and *P. B. Hutchins*, shewed cause. The plaintiff cannot recover in this action: *Snelling* v. *Lord Huntingfield* (1) shews that the express verbal contract of Saturday, the 21st of April, was still in existence, and that no fresh contract can be implied from acts done in pursuance of it. That contract was for a year's service to commence at a future day, and was therefore a contract not to be performed within a year: *Bracegirdle* v. *Heald* (2); *Banks* v. *Crossland* (3); nevertheless, whilst it remained unrescinded no other contract between the parties can be implied. The words of the Statute of Frauds, s. 4, are express, and no action can be brought upon a contract falling within its prohibition: *Leroux* v. *Brown*. (4) The fact that the contract has been partly performed, does not affect the position of the parties: *Giraud* v. *Richmond*. (5) The equitable doctrine of part performance, whereby the operation of the Statute of Frauds has been defeated, has always been confined to contracts for the sale and purchase of lands, and has not been extended to contracts of other kinds.

Firth, in support of the rule. A contract falling within the prohibition of the Statute of Frauds, s. 4, is void to all intents and purposes: *Carrington* v. *Roots* (6); *Reade* v. *Lamb* (7); *Inman* v. *Stamp*. (8) A contract that is void in part is void altogether: *Thomas* v. *Williams*. (9) Therefore the contract of Saturday the 21st of April may be treated as no contract, and a fresh contract of service may be implied from the acts of the parties.

As to the doctrine of part performance, it is true that the Court of Chancery formerly applied it only to contracts for the sale of land, and there may have been a difficulty in decreeing specific performance of a contract for personal services: *Pickering* v. *Bishop of Ely* (10); *Johnson* v. *Shrewsbury and Birmingham Ry. Co.* (11) But the Court of Chancery would not allow the provisions of a statute to defeat a claim, which good conscience

(1) 1 C. M. & R. 20.
(2) 1 B. & Ald. 722.
(3) Law Rep. 10 Q. B. 97.
(4) 12 C. B. 801.
(5) 2 C. B. 835.
(6) 2 M. & W. 248.
(7) 6 Ex. 130.
(8) 1 Stark. 12.
(9) 10 B. & C. 664.
(10) 2 Y. & C. (Ch.) 249.
(11) 3 D. M. & G. 914.

required to be carried out: *Bond* v. *Hopkins* (1); *Morphett* v. *Jones*. (2) The defence set up by the defendant is wholly against good conscience. And now by the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25, subs. 7, the doctrines of equity may be applied to cases decided in the Common Law Divisions.

BRETT, L.J. Upon the best consideration which I can give to this case, it seems to me that this rule should be discharged. I think that Hawkins, J., was right, and that the Exchequer Division was also right. It was clearly established that on Saturday, the 21st of April, a contract of service was in express terms entered into between the plaintiff and the defendant that the plaintiff should serve the defendant for one year, the contract to commence the Monday following. It cannot be disputed that a contract of that kind is within the 4th section of the Statute of Frauds, that is to say, it is a promise founded upon a sufficient consideration, but it being only verbal neither party can bring an action upon it so as to charge the other. It is, however, contended that as the plaintiff did on Monday, the 23rd of April, enter into the defendant's service and continue in it for some months, another contract to serve for a year ought to be implied, attended with the same consequences as the original contract, but outside the Statute of Frauds. It is alleged that this contract can be implied, because the contract originally entered into is void. But, according to the true construction of the statute, it is not correct to say that the contract is void; and, in my opinion, no distinction exists between the 4th and the 17th sections of the statute: at all events, the contract is not void under the 4th section; the contract exists, but no one is liable upon it. It seems to me impossible that a new contract can be implied from the doing of acts which were clearly done in performance of the first contract only, and to infer from them a fresh contract would be to draw an inference contrary to the fact. It is a proposition which cannot be disputed that no new contract can be implied from acts done under an express contract, which is still subsisting; all that can be said is that no one can be charged upon the original contract because it is not in writing. At the bar

(1) 1 Sch. & Lef. 413. (2) 1 Swan. 172.

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reliance was placed upon *Carrington* v. *Roots* (1), and *Reade* v. *Lamb* (2); in the former case Parke, B., said: "I think the right interpretation of" the 4th section of the Statute of Frauds "is this, that an agreement which cannot be enforced on either side is as a contract void altogether;" in the latter, Pollock, C.B., said: "*Carrington* v. *Roots* (1) is in effect a decision that, for the purposes of the present question, there is no distinction between the 4th and 17th sections of the Statute of Frauds, and that not only no action can be brought upon an agreement within the 4th section of that statute if it be not reduced into writing, but that the contract is also void." With regard to these dicta it is enough to say that the doctrine thereby laid down was unnecessary for the decisions in those cases: for it being clear that no action can be brought on the verbal contract itself, it is also clear that neither party can be held liable upon it indirectly in any action, which necessitates the admission of the existence of the contract. The two cases which I have mentioned were considered in *Leroux* v. *Brown* (3), and Jervis, C.J., undoubtedly took the same view of them as I do, and gave the interpretation necessary for that case, namely, that the contract is not void, but only incapable of being enforced, and that any claim which depends upon the contract as such cannot be maintained. If the contrary view had prevailed, it would have been decided in that case that the Statute of Frauds, s. 4, had a territorial operation; whereas if it applies merely to the enforcement of the contract, then it is a statute with respect to the procedure of the English Courts, and it is applicable to contracts made abroad as well as in England. Moreover, the case of *Snelling* v. *Lord Huntingfield* (4) has not been overruled by subsequent cases, but the doctrine there laid down has been strongly supported by subsequent cases, and in my opinion it certainly ought not to be overruled now. In my view the contract entered into on the 21st of April was not void but existing, and from a part performance of it a fresh contract ought not to be implied. The plaintiff, therefore, is driven to rely upon the original contract, but he cannot maintain an action upon that, inasmuch as it is not in writing.

(1) 2 M. & W. 248.
(2) 6 Ex. 130.
(3) 12 C. B. 801.
(4) 1 C. M. & R. 20.

It has been further contended that as the contract of the 21st of April has been partly performed, it may be enforced, notwithstanding the Statute of Frauds, and that the equitable doctrine as to part performance may be applied to it. It is well known that where a contract for the sale of land had been partly performed, Courts of Equity did in certain cases recognise and enforce it; but this doctrine was exercised only as to cases concerning land, and was never extended to contracts like that before us, because they could not be brought within the jurisdiction of Courts of Equity. Those Courts could not entertain suits for specific performance of contracts of service, and therefore a case like the present could not come before them. As to the application of the doctrine of part performance to suits concerning land, I will merely say that the cases in the Court of Chancery were bold decisions on the words of the statute. The doctrine was not extended to any other kind of contract before the Judicature Acts: can we so extend it now? I think that the true construction of the Judicature Acts is that they confer no new rights; they only confirm the rights which previously were to be found existing in the Courts either of Law or of Equity; if they did more, they would alter the rights of parties, whereas in truth they only change the procedure. Before the passing of the Judicature Acts no one could be charged on this contract either at law or in equity; and if the plaintiff could now enforce this contract, it would be an alteration of the law. I am of opinion that the law remains as it was, and that the plaintiff cannot maintain this action for breach of contract.

COTTON, L.J. We refused to grant a rule on the ground that the contract entered into on Saturday, the 21st of April, was to be performed within a year, and therefore not within the operation of the 4th section of the Statute of Frauds: the contract clearly was within that enactment: on the other points we granted a rule, but after having heard the arguments on behalf of the plaintiff, I think that the rule for a new trial must be discharged. It has been contended that although the express contract cannot be enforced, nevertheless a contract which can be enforced may be implied from conduct of the parties, and it has been argued that

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the rule does not apply which forbids a contract to be implied where an express contract has been concluded, because the contract was void under the provisions of the Statute of Frauds, s. 4: but in my opinion that is not the true construction of the enactment, which provides that no action shall be brought to charge any person upon the verbal contract.

In the first place, I may observe that to hold that this enactment makes void verbal contracts falling within its provisions, would be inconsistent with the doctrine of the Courts of Equity with regard to part performance in suits concerning land. If such contracts had been rendered void by the legislature, Courts of Equity would not have enforced them; but their doctrine was that the statute did not render the contracts void, but required written evidence to be given of them: and Courts of Equity were accustomed to dispense with that evidence in certain instances. During the argument some decisions were relied upon as shewing that the contract in the present case was void. In *Carrington* v. *Roots* (1), certain expressions were used by the judges which indicated that in their opinion a verbal contract falling within s. 4 was void; but I think that their language when carefully analysed merely means that the contract was not enforceable either directly or indirectly by action at law. I think it unnecessary to go into the case of *Reade* v. *Lamb* (2): it was a case decided upon special demurrer, and the question to which the attention of the judges was directed, was whether the pleadings were correct in point of form.

It has been further argued that the contract may be enforced, because it has been in part performed. Let me consider what is the nature of the doctrine as to part performance. It has been said that the principle of that doctrine is that the Court will not allow one party to a contract to take advantage of part performance of the contract, and to permit the other party to change his position or incur expense or risk under the contract, and then to allege that the contract does not exist; for this would be contrary to conscience. It is true that some dicta of judges may be found to support this view, but it is not the real explanation of the doctrine, for if it were, part-payment of the purchase-

8 App Cas 474 480

(1) 2 M. & W. 248. (2) 6 Ex. 130.

money would defeat the operation of the statute. But it is well-established and cannot be denied that the receipt of any sum, however large, by one party under the contract, will not entitle the other to enforce a contract which comes within the 4th sect. What can be more contrary to conscience than that after a man has received a large sum of money in pursuance of a contract, he should allege that it was never entered into? The true ground of the doctrine in equity is that if the Court found a man in occupation of land, or doing such acts with regard to it as would, primâ facie, make him liable at law to an action of trespass, the Court would hold that there was strong evidence from the nature of the user of the land that a contract existed, and would therefore allow verbal evidence to be given to show the real circumstances under which possession was taken. Does this doctrine, when so explained, apply to the present case? I will first mention the provisions of the Judicature Act, 1873, s. 24, subs. 4, 7. These provisions enable the Courts of Common Law to deal with equitable rights and to give relief upon equitable grounds: but they do not confer new rights: the different divisons of the High Court may dispose of matters within the jurisdiction of the Chancery and the Common Law Courts; but they cannot proceed upon novel principles. Could the present plaintiff have obtained any relief in equity before the passing of the Judicature Acts? I think that he could not. The doctrine as to part performance has always been confined to questions relating to land; it has never been applied to contracts of service, and it ought not now to be extended to cases in which the Court of Chancery never interfered.

THESIGER, L.J. Two questions must be considered in this case—first, whether the plaintiff could maintain an action at law: secondly, whether, if he could not maintain an action at law, he could maintain a suit in equity. I am compelled to subscribe to the opinion that the plaintiff had no remedy either at law or in equity. I have been unwilling to come to this conclusion, because it is manifestly unjust that where a contract of hiring has been acted on for a certain time, one party who has had the

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advantage of it should be able to put an end to it; and I should have been glad to decide that the plaintiff was entitled to a reasonable notice of dismissal.

First, has the plaintiff a right of action at law? It is clear that a contract was made on Saturday, the 21st of April, and it cannot be contended that a contract made at that date to commence from the 23rd of April is not within the 4th section of the Statute of Frauds. It is necessary to consider what is the effect of the statute upon such a contract; is it that the contract is wholly null so that it does not prevent the proof of any other contract, or is it that the contract exists but cannot be enforced? Certain dicta are to be found in the books from which it might appear that some of the judges have considered the verbal contract as absolutely void. But if those dicta are carefully examined, it will be found that they are not necessary for the decision of the cases in which they appear, and upon referring to subsequent cases it will be found that it has been decided in clear terms that the verbal contract is not actually void. It is impossible to say that the words of the statute make the verbal contract void. That a verbal contract is not void, is proved by the circumstance that where one party has signed the contract and the other has not, the party who has signed may be charged upon it, but that the party who has not signed cannot be charged. It may also be urged with some show of reason that though there is a difference in language between the 4th and 17th sections of the Statute of Frauds, they are substantially identical in construction, and *Carrington* v. *Roots* (1) and *Reade* v. *Lamb* (2) may perhaps be cited in support of that argument. And it is plain that verbal contracts under the 17th section are not absolutely void for all purposes, for the section provides that part performance by payment or acceptance and receipt of goods shall authorize the court to look at the terms of the contract, although it is not in writing. But I need not discuss this question further, for in *Snelling* v. *Lord Huntingfield* (3), which has never been overruled but on the contrary has been

(1) 2 M. & W. 248. (2) 6 Ex. 130.

(3) 1 C. M. & R. 20.

often followed, it was held that a contract not enforceable by reason of the Statute of Frauds, sect. 4, nevertheless existed, and no contract can be implied where an express contract exists. I think that we are bound by the authority of that case. There was, therefore, in existence a contract made in express terms on Saturday, the 21st of April, and the plaintiff cannot sue upon it, as it is not in writing. It appears to have been held that, though there may be no right to recover on an executory contract, nevertheless, if it has been executed to the extent of the contractee entering upon the service, that is enough to entitle him to be paid for his services, and if we were not bound by authority it would be difficult to understand why if the plaintiff can sue for services rendered, he should not equally be entitled to allege that he shall not be dismissed without notice or without such notice as was stipulated for in the contract. But in *Snelling* v. *Huntingfield* (1), the Court of Exchequer appears to have thought that the contractee can recover for services rendered but not for dismissal without notice. This seems to have been the construction at Common Law.

If we turn to Equity, we find that it has been held as regards a sale of land, that when there has been an entry by one party to the contract, that is an overt act apparently done under a contract which entitles the Court to look at the contract to see to what contract the overt act is really referable. I confess that on principle I do not see why a similar doctrine should not be applied to the case of a contract of service, and as the doctrine of Equity is based upon the theory that the Court will not allow a fraud on the part of one party to a contract on the faith of which the other party has altered his position, I do not see why a similar doctrine should not comprehend a contract of service. At the same time I feel that doctrines of this nature are not to be unwarrantably extended, and that we ought not to go further than the decisions of Courts of Equity as to the principles of relief, and as to the instances to which the doctrine of part performance is to be applied. Therefore, as we cannot clearly see that the equitable doctrine of part performance ought to be

(1) 1 C. M. & R. 20.

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extended to contracts of service, I think that we ought to keep within the limits observed by the Court of Chancery before the passing of the Judicature Acts, 1873, 1875.

Rule discharged.

Solicitor for plaintiff: *W. Tanner.*

Solicitors for defendant: *Pike & Son.*

J. E. H.

1883

April 25, 26.

THE QUEEN (ON THE PROSECUTION OF THE SOUTHBOROUGH BURIAL BOARD) *v.* THE OVERSEERS OF THE PARISH OF TONBRIDGE.

Burial Board—Appointment of Burial Board—18 & 19 *Vict. c.* 128, *s.* 12.

By s. 12 of 18 & 19 Vict. c. 128, a meeting in the nature of a vestry of any district not separately maintaining its own poor, which has heretofore had a separate burial ground, may appoint a burial board, which shall have the same powers as if such district had been a parish separately maintaining its own poor:—

Held, that the powers given by the section did not apply to a district forming part of an area over which a burial board already exercised jurisdiction, and therefore that no burial board could be legally constituted in such a district.

SPECIAL CASE.

The parish of Tonbridge is a parish maintaining its own poor, and is constituted and made up of the following six, or more, ecclesiastical districts of Tonbridge, Tonbridge Wells, St. Peter, Southborough, St. Thomas, Southborough, St. Stephen and Hildenborough, none of which districts has ever separately maintained its own poor, all of them contributing to a common rate levied for the relief of the poor by the parish overseers throughout the entire parish.

In the year 1831 a district was, under 1 & 2 Wm. 4, c. 38, and other statutes, assigned to the new church of St. Peter, then lately built upon land provided by the lord of the manor of Southborough by deed of gift, and the church with a burial ground for the new district was duly consecrated, and in the year 1866, the said burial ground was enlarged by a further grant of land from the lord of the manor, and the expense of laying out the land as a burial ground was defrayed by a voluntary rate levied upon all the inhabitants of the district.

In the year 1871 a district was assigned, under 59 Geo. 3,

c. 134, and other statutes, to a new church of St. Thomas within the limits of the aforesaid district of St. Peter.

The burial ground aforesaid has always been the separate burial ground of the original district of St. Peter, and has been used exclusively by the inhabitants thereof, and since the district of St. Thomas has been formed out of the district of St. Peter, the two districts have had the burial ground exclusively for their joint use.

Since the formation of the district of St. Thomas the inhabitants of the two districts of St. Peter and St. Thomas have been accustomed to meet in meetings in the nature of a vestry for purposes common to them both, such meetings being summoned by the churchwardens of the district of St. Peter.

In the year 1855, subsequently to the passing of 18 & 19 Vict. c. 128, a meeting of the inhabitants of the parish of Tonbridge was held in pursuance of notice, copies of which had been affixed to the doors of all the churches in the parish, including those at Southborough, but excepting those within the ecclesiastical district of Tonbridge Wells; and at the meeting resolutions were duly passed for the formation of a burial board for such part of the parish of Tonbridge as was not included in the Tonbridge Wells ecclesiastical district. The inhabitants of the Southborough districts as a body were opposed to the resolutions.

The burial board constituted in accordance with resolutions passed at the meeting acquired a site about the centre of the parish of Tonbridge, but at the end of the town farthest from Southborough, and established a cemetery thereon, being about three and a quarter miles distant from the church of St. Peter, and the inhabitants of Southborough were rated for the expense incidental to the establishment of the cemetery, and have been ever since rated for the expenses incidental to the maintenance thereof, although in fact the inhabitants of Southborough have continued to use the St. Peter's burial ground.

In the year 1858 the legality of the constitution of the Tonbridge burial board was called in question, but it was decided by the Court of Queen's Bench in the case of *Viner* v. *Tonbridge Overseers* (1), that the burial board was legally constituted.

(1) 28 L. J. (M.C.) (Q.B.) 251.

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In the year 1878 the burial board of Tonbridge found it necessary to enlarge the cemetery, and for this purpose a meeting of the inhabitants of the parish of Tonbridge was held in pursuance of notice, copies of which had been affixed to the doors of all the churches in the parish including those in Southborough, but excepting those within the ecclesiastical district of Tonbridge Wells, and resolutions were duly passed at such meeting empowering the burial board to enlarge the cemetery, and to raise a sum of money sufficient for that purpose upon the security of the future poor-rates of such portion of the parish as was not included in the ecclesiastical district of Tonbridge Wells. The inhabitants of the Southborough districts as a body were opposed to the resolutions.

Subsequently to this it was found necessary by the inhabitants of the districts of St. Peter and St. Thomas that the burial ground at Southborough, jointly used by them, should be enlarged, and accordingly the churchwardens of St. Peter's district summoned a meeting in the nature of a vestry for the 3rd of February, 1879, by notices signed by them and affixed to the doors of all the churches and chapels in the districts of St. Peter and St. Thomas. The inhabitants of the other districts included in the jurisdiction of the Tonbridge Burial Board were not in any way consulted in the matter, nor was any notice of the meeting or of the purposes thereof given to any of the parishioners residing outside the limits of Southborough.

The meeting consisted exclusively of the ratepayers from the two districts of St. Peter and St. Thomas, who thereupon appointed a burial board for the two districts, and vacancies therein have since from time to time been filled up at similar meetings.

In September, 1881, the burial board thus appointed for Southborough, having incurred expenses to the amount of 292*l.* 10*s.* in the enlargement of their burial ground, and otherwise in reference thereto, issued their certificate to the overseers of the parish of Tonbridge for payment of that sum. A copy of that certificate forms part of this case.

The overseers decline to act upon the certificate or to pay the sum or any part thereof to the burial board, on the ground that the burial board has not been, and cannot be, legally constituted.

The burial board contend that they have been legally constituted under 18 & 19 Vict. c. 128, ss. 11, 12, which are in the following terms:— (1)

Sect. 12 is as follows:—

"The vestry or meeting in the nature of a vestry of any parish, township, or other district not separately maintaining its own poor, which has heretofore had a separate burial ground, may appoint a burial board and from time to time supply vacancies therein, and may exercise the same powers of authorization, approval, and sanction in relation to such burial board, and such other powers as under the said Acts and this Act are vested in the vestry of a parish separately maintaining its own poor; and the burial board so appointed shall have all the powers for providing a burial ground and otherwise as if such parish, township, or other district had been a parish separately maintaining its own poor."

On the 24th of June, 1882, the Queen's Bench Division, upon the application of the Southborough Burial Board, made an order that a writ of mandamus should issue directed to the overseers of the parish of Tonbridge commanding them to levy and pay to the clerk of the Southborough Burial Board the sum of 292*l.* 10*s.*, according to the certificate dated the 24th of April, 1882, and that, by consent of counsel on both sides, no objection should be taken to the form of the writ, and that a special case should be stated without pleading to be settled by counsel on both sides, or in case of difference by an arbitrator.

The question for the Court was whether upon the facts hereinbefore stated the inhabitants of Southborough had any power under the sections hereinbefore set forth to constitute a separate burial board for the districts of St. Thomas and St. Peter.

April 25. *Meadows White, Q.C.* (*Archibald*, with him), for the applicants.

Lumley Smith, Q.C. (*Candy*, with him), for the defendants. The arguments are fully stated in the judgment.

Cur. adv. vult.

(1) The argument on behalf of the applicants was not rested on s. 11.

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April 26. FIELD, J. This case raises a difficult question. The Court has to construe various Acts of Parliament passed at different periods, and to arrive at the meaning and intention of the legislature as expressed in those Acts.

The course of legislation down to the passing of 18 & 19 Vict. c. 128 was as follows:—In 1852 an Act applicable solely to the metropolis (15 & 16 Vict. c. 85) was passed for the purpose of providing space for the interment of those who previously had a right of interment in metropolitan burial grounds, which could now be closed by the Secretary of State under powers given by the Act. The Act also gave power to vestries of metropolitan parishes to appoint burial boards. In 1853 some of the provisions of the Act of 1852 were applied to non-metropolitan parishes, and for the first time those parishes were enabled to appoint burial boards, and several parishes might concur in providing a burial ground for their common use. In 1854, by 17 & 18 Vict. c. 87, further provision was made for the burial of the dead beyond the limits of the metropolis, and in the following year the Act 18 & 19 Vict. c. 128, was passed. We have to decide whether, upon the true construction of that Act, the burial board of Southborough, appointed under the circumstances set out in the case, had any legal foundation which justified them in requiring the overseers of the parish of Tonbridge to make a rate upon the districts of St. Peter and St. Thomas for the purpose of defraying certain expenditure which the burial board of Southborough had incurred. The general argument on behalf of the Southborough Burial Board was this: It was said that the board came within the very terms of s. 12; that the meeting by which the board was appointed was a meeting in the nature of a vestry and of the inhabitants of Southborough, which was a district not separately maintaining its own poor, and which theretofore had a separate burial ground. So far as that argument treated Southborough as one district for burial purposes I think it was right, because when the ecclesiastical district of St. Thomas was constituted in 1879 Southborough had its separate burial ground, and the inhabitants of the district of St. Thomas never lost their right of interment in that burial ground. The general argument on behalf of the overseers of the parish of Tonbridge was this: that assuming the appointment of

a burial board for the district of Southborough was brought within the words of s. 12, it was not within the intention of the legislature to be inferred from the whole code of legislation, and that when once a burial board had been constituted having jurisdiction over a certain rateable area, it was not the intention to empower the appointment of a second board for a district already under that jurisdiction, so as to bring about a conflict of jurisdictions and impose an inconvenient liability to be doubly rated upon the inhabitants of the district subject to the new board. In support of the argument on behalf of the Southborough Burial Board, reliance was placed on s. 13 of 18 & 19 Vict. c. 128, which enables any district having a burial board, and not separately maintaining its own poor, but forming part of a parish maintaining its own poor, to call upon the overseers of the parish for payment of the sums required for the expenses of such burial board. That section, it was contended, shewed that the legislature contemplated the existence of a burial board in a district not separately maintaining its own poor, irrespective of the question whether or not the parish had a burial board. Sect. 5 of the subsequent Act, 20 & 21 Vict. c. 81, was also relied on, which empowers the vestry, or meeting in the nature of a vestry, of any parish, &c., or other district not separately maintaining its own poor, and not having a separate burial ground, to appoint a burial board, which shall exercise and have all the powers which they might have exercised and had under the Burial Acts, if such parish or district had a separate burial ground before the passing of the Act 18 & 19 Vict. c. 128; and there follows a proviso that all the powers of any other burial board shall cease so far as relates to such parish or district. It was argued that these provisions shewed that the legislature felt no particular difficulty in respect of determining the rights of an existing burial board over any district, and it was suggested that some such provision as is contained in the proviso is implied and should be read in s. 12 of 18 & 19 Vict. c. 128.

On the other hand portions of 20 & 21 Vict. c. 81, were also relied on in support of the contention for the overseers of the parish of Tonbridge. It was pointed out that the Act of 1853 enabled several parishes to concur in having one burial ground,

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but, in the view that it might be desirable to give a power of putting an end to such an arrangement, that power was given by s. 2 of 20 & 21 Vict. c. 81, which provides that, where the vestries of two or more parishes have agreed to provide one burial ground for the common use of such parishes, the union may be determined, with this important qualification, "at any time before such burial ground has been provided," i.e., before the money to provide a burial ground has been borrowed; and the section further enacts that the parishes and their respective burial boards shall be treated as though no union had been formed, except that expenses already properly incurred by the joint burial board for such parishes shall be defrayed in manner provided by the Acts. Upon this section it was argued that express legislation was required to enable a union, when once formed, to be divided; that when once a burial board had been appointed, s. 12 of 18 & 19 Vict. c. 128, could not apply; that if that section had been intended to apply to a district forming part of an area already under the jurisdiction of a burial board, it would be necessary to read into that section, not only some such provision as is contained in the proviso to s. 5 of 20 & 21 Vict. c. 81, with respect to the discontinuance of the powers of that burial board, but also some such provision as is found in s. 2 of the same Act, for determining the liabilities of the new district for the future, and declaring how past liabilities already incurred should be defrayed; that no such provisions are found in s. 12 of 18 & 19 Vict. c. 128, and it would have been easy for the legislature to have expressly applied the provisions of ss. 2 and 5 of 20 & 21 Vict. c. 81, to s. 12 of 18 & 19 Vict. c. 128, if their intention had been to enable districts in the position of Southborough to appoint a burial board. Reliance was placed also on s. 9 of 20 & 21 Vict. c. 81, as shewing the general intention of the legislature to restrict the power of constituting burial boards. That section expressly provides that the consent of the Secretary of State shall be necessary before a burial board can be appointed in cases provided for by 18 & 19 Vict. c. 128, where a parish or place separately maintains its own poor, or has a separate burial ground. The principle of legislation indicated in this argument seems to have been continued in 23 & 24 Vict. c. 64. By s. 4 it is provided that where any

parish or place has been divided into two or more parts or districts for all or any ecclesiastical purposes, and any one of such parts has a separate burial ground, it shall not be lawful for the vestry or meeting in the nature of a vestry for such entire parish or place to appoint a burial board without the approval of the Secretary of State.

The question is which construction of s. 12 of 18 & 19 Vict. c. 128 are we to adopt? I do not say the matter is at all clear; it is not; but upon a careful consideration of the whole legislation I come to the conclusion that the contention on behalf of the overseers of the parish of Tonbridge ought to prevail, and that the Southborough Burial Board was not a board lawfully appointed. During the discussion great light was thrown upon the subject by the case of *Reg.* v. *Overseers of Walcot, St. Swithin.* (1) The case is not in point here, being a decision upon 20 & 21 Vict. c. 81, s. 5, but the reasoning upon which it was founded appears to me very instructive in the present case, because the decision seems to have turned upon the existence of the proviso in s. 5 of 20 & 21 Vict. c. 81, and upon the extreme improbability that the legislature could have intended to have brought into existence two separate jurisdictions over the same rateable area.

For these reasons, therefore, I am of opinion that the rule for a mandamus must be discharged, and that the judgment must be for the defendants.

MATHEW, J., concurred.

Judgment for the defendants.

Solicitors for applicants: *Tilleard, Godden, & Holme.*
Solicitors for defendants: *White & Sons.*

(1) 2 B. & S. 571.

W. A.

1883
May 22.

COLLINS *v.* STIMSON.

Vendor and Purchaser—Deposit—Forfeiture for Non-completion—Payment by Bankrupt in Fraud of Creditors—Right to follow Money.

A bankrupt, having disposed of his goods in fraud of his creditors, opened an account in a bank with the proceeds, and having entered into a contract for the purchase of land in an assumed name, paid a deposit to the defendant, the auctioneer, by a cheque drawn upon the bank. The vendor and the defendant acted bonâ fide and without notice of the bankruptcy or of the fraudulent conduct of the bankrupt:—

Held, that the bankrupt's trustee was not entitled to recover the deposit from the defendant so as to prevent it from being forfeited to the vendor upon the non-completion of the contract.

Special Case.

J. C. Wilson of Swindon, Wilts, grocer, was, on the 20th of September, 1882, adjudicated bankrupt by the County Court of Wilts, and on the 4th of October the plaintiff was appointed trustee under the bankruptcy. On the 26th of August, 1882, Wilson, having secretly realised the greater part of his property and effects, absconded from Swindon, taking with him a large sum of money in gold and bank notes, the proceeds of his property, and opened an account at the London and South Western Bank, Clapham Branch. While in London, on the 10th of October, he assumed the name of Watson, and purporting to act as the agent of Miss M. Tomkins, but in fact (though this was not known to the defendant or to the vendor) on his own behalf, entered into an agreement in writing for the purchase of freehold house property at Wandsworth, Surrey, for 950*l*. At the same time Wilson paid to the defendant, who is an auctioneer and valuer, 95*l*. as a deposit of 10 per cent. on the purchase-money, and which the defendant received as stakeholder under the agreement. This payment was made by Wilson's cheque on the Clapham Branch of the London and South Western Bank, and the cheque was duly paid by the bank. Neither the defendant nor the vendor knew at the time of the agreement, and the payment of the deposit, the facts as to the previous history of Wilson, and they acted bonâ fide and in the ordinary course of business in their dealings with him.

The purchase of the property not having been duly completed

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in accordance with the agreement, the vendor, in January, 1883, commenced an action in the Chancery Division against Wilson for specific performance, which was discontinued when the fact of his bankruptcy became known.

The question for the opinion of the Court was whether the plaintiff was entitled to recover the amount of the deposit from the defendant.

Lamaison, for the plaintiff. The plaintiff as trustee was entitled to the proceeds of the goods which were improperly sold by the bankrupt, and the deposit is sufficiently earmarked as part of these proceeds to enable the trustee to follow and recover it. *Re Hallett's Estate* (1) following *Taylor* v. *Plumer*. (2)

Temple Cooke, for the defendant. The trustee cannot follow the money when it has been paid to a third person, who has received it bona fide and has been induced to alter his condition in consideration of the payment: *Ex parte Dewhurst* (3), where it was held that money paid away for rent by an uncertificated bankrupt could not be followed by the trustee. The deposit is paid as security for the performance of the contract, and is forfeited upon non-performance. It has always been considered as part payment of the purchase-money, and the vendor is in the same position as an ordinary creditor who has received part payment.

Lamaison, in reply. The deposit not having been actually paid over, the trustee has a right to follow and intercept it. The vendor has sustained no damage, as he has not parted with the possession of his property, and he has no claim superior to that of the trustee.

POLLOCK, B. I think the defendant is entitled to judgment. It appears from the special case that Wilson with intent to defeat and delay creditors realised his property, paid the proceeds into a bank, and then entered into an agreement for the purchase of some house property, one term of which was that he should pay a deposit of 10 per cent. on the purchase-money to the defendant, an auctioneer. According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract, and where the contract

(1) Per Jessel, M.R., 13 Ch. D. 710, 711. (2) 3 M. & S. 562.
(3) Law Rep. 7 Ch. 185.

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goes off by default of the purchaser, the vendor is entitled to retain the deposit. Now has anything occurred to affect this right? In the present case the deposit was paid not to the vendor but to an auctioneer, and the law, as is well known, is that an auctioneer to whom a deposit is paid under such circumstances receives it as the agent of both parties, and cannot part with it without the sanction of both of them. The vendee, the bankrupt, cannot claim the money, for he has never been in a position to complete his contract. The only question is whether the trustee in bankruptcy can recover it as money received for his use. I agree with the argument that the money is sufficiently earmarked to enable the trustee to follow it. The judgment of Jessel, M.R., in *In re Hallett's Estate* (1) is conclusive upon this point. But admitting that the deposit is earmarked, can it be reclaimed by the trustee? I think not. There was a valid contract for the purchase of land, made bonâ fide by the vendor with the usual stipulation for a deposit. This contract has never been fulfilled by the vendee, and it is impossible to say that the position of the vendor has not been altered. The claim to the deposit as forfeited is not a claim to a penalty but a claim to damages for breach of the agreement, which the parties have settled at a fixed sum. No authority has been cited in support of the plaintiff's contention, and I think it is entirely opposed to principle.

LOPES, J. I am of the same opinion. The question is whether the trustee in bankruptcy can follow a certain sum of money which was paid by the bankrupt as the deposit on a contract for the purchase of property. The deposit was really paid as part of the purchase-money, and was a payment the necessary consequence of which was to induce the vendor to alter his position and to incur expenses. I am unable to distinguish the case from that of a money paid to an ordinary tradesman who bonâ fide receives it in part payment of his debt.

Judgment for the defendant.

Solicitors for plaintiff: *Crafter & Burton.*
Solicitor for defendant: *J. D. Peard.*

(1) 13 Ch. D. 710.

A. P. S.

[IN THE COURT OF APPEAL.]

1883
March 15.

MARTIN, APPELLANT; THE ASSESSMENT COMMITTEE OF THE WEST DERBY UNION AND OTHERS, RESPONDENTS.

Poor rate—Residence of Police Officer—Residence when not part of the Police Station—Rateability—Building for public purposes.

A superintendent of the police for a county police division had as his quarters a house, which was rented for him by the county authorities, and which he furnished; his rent was paid out of the police rates, and the amount deducted from his salary as superintendent. The house was liable to be examined and its fitness reported by one of Her Majesty's inspectors, and to be used for purposes connected with the police force as the chief constable might direct, but no room in it was specially set apart for any other purpose than for the use of the superintendent and his family. The house was a quarter of a mile from the police station, within a convenient distance of which it was necessary that the superintendent should reside for the performance of his duties; and he was compelled to live in it as long as it was rented for him by the county authorities, but he was liable to be removed from it at any time, and from one police division to another:—

Held, that such superintendent was rateable to the poor rate in respect of such house, as his occupation was a beneficial one, and the house, being no part of the police-station, did not come within the recognised heads of property which is treated as Crown property.

The case of *Gambier* v. *Overseers of Lydford* (3 E. & B. 346; 23 L. J. (M.C.) 69) approved.

APPEAL against a poor rate, a county rate, and a local rate made by the overseers of the poor of West Derby, in respect of certain premises in the appellant's occupation.

The following facts were stated in a case for the opinion of the Court:

The appellant was superintendent of the police for the West Derby Police Division of the said county of Lancaster.

The respondents were respectively the assessment committee of the West Derby Union and the overseers of the poor of the township of West Derby, in the said county.

The rates in respect of which this appeal was brought, included a poor-rate made in respect of the house and premises in which the appellant resided, in the said township.

The county constabulary force of Lancashire was established under 2 & 3 Vict. c. 93, and station-houses, and strong rooms and

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other buildings, and accommodation requisite for the use of the force have been built or provided under 3 & 4 Vict. c. 88.

The police force, and all police stations, are annually inspected by one of Her Majesty's inspectors appointed under the Act of 19 & 20 Vict. c. 69, and if his report is satisfactory a grant is made by the Lords of the Treasury amounting to one-half of the expense of the pay and clothing of the force in aid of the rates. Her Majesty's inspectors have in some cases examined into and reported as to the fitness of the houses taken as residences for police officers in the same way as the said house was taken for the appellant as hereinafter mentioned:

In 1863, the police divisions of Lancashire were remodelled and a superintendent was transferred from Bootle police station, where there were quarters in which a superintendent resided, to Old Swan police station, where there were not then nor are there now, quarters in which a superintendent could reside.

The justices in petty session have since 1863, from time to time authorized the chief constable of the county to hire a house for the superintendent in charge of the division.

On the 24th day of March, 1880, the county authorities took the said house upon a verbal agreement for a yearly tenancy at an annual rent of 50*l.*, which has been paid half-yearly by the chief constable of the county, and was charged upon and paid out of the police rates of the police division of West Derby.

When the county, through the chief constable, provides quarters for the residence of police officers, whether the quarters are provided in police stations or elsewhere, a deduction varying with the amount of pay is made from the salary of the police officer. The amount deducted from the salary of superintendents, and, amongst others, from the salary of the appellant, was 17*s.* 4*d.* a month. The house was liable to be used for such purposes connected with the police force as the chief constable might direct.

The appellant occasionally did police business in the house, but there was no room specially set apart for any purpose other than for the use of the appellant and his family.

Blinds, gas, and other fittings in the house, were provided by the county, which also found gas and coals. The appellant provided the furniture for the house.

The police station for the West Derby Division was situate in Prescot Road in the township of West Derby, and was distant a quarter of a mile from the house. It was necessary that the appellant should reside within a convenient distance from the police station for the due performance of his official duties.

So long as the county authorities rented the house for the residence of the appellant, he was compelled to live in such house, and he was liable to be removed at any time from the house and premises and from one police division to another.

The Court was to have power to draw all such inferences of law and fact as they might think proper.

The question for the opinion of the Court was, whether the appellant was liable to be rated in respect of the house and premises to the poor rate, county rate, and local rate, or to any and which of them.

The Queen's Bench Division, acting on the authority of *Gambier* v. *Overseers of Lydford* (1), held that the appellant was liable be so rated in respect of the said house and premises.

The appellant appealed from this decision.

Gorst, Q.C., and *Hulton*, for the appellant. The appellant has no beneficial occupation of the house so as to be liable to be rated in respect of it. The house is hired by the county authorities under 3 & 4 Vict. c. 88, s. 12, in order to provide police accommodation.

[BRETT, L.J.:—This house is no part of the station. It is a quarter of a mile from the station.]

It is used for police purposes. It is liable to inspection as to its fitness for the police by Her Majesty's inspectors under 19 & 20 Vict. c. 69, s. 15, and it falls within the general category of premises used for the general government of the country which are not liable to be rated according to the principle laid down in *Mersey Docks and Harbour Board* v. *Cameron* (2), *Justices of Lancashire* v. *Overseers of Stretford* (3), and *Coomber* v. *Justices of Berks* (4). The appellant is obliged to live in the house and is

(1) 3 E. & B. 346; 23 L. J. (M.C.) 69.
(2) 11 H. L. Cas. 443.
(3) E. B. & E. 225; 27 L. J. (M.C.) 209.
(4) 10 Q. B. D. 267.

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liable to be removed at any time from it and from one police division to another. He is like the superintendent of police who was held in *Bent* v. *Roberts* (1) to be not liable to the inhabited house duty.

[BRETT, L.J.:—The appellant's house here differs from the house in that case, inasmuch as it forms no part structurally or otherwise of the police station.]

But his occupation is only that of a servant of the constabulary, as Kelly, C.B., considered the occupation of the appellant was in *Bent* v. *Roberts*. (1) The occupation was subservient to and necessary to the service, and was the occupation therefore of the master: *Reg.* v. *Spurrell*. (2) At all events the appellant's occupation was not that of a tenant, and therefore he was not liable to be rated any more than the defendants in *London & North Western Ry. Co.* v. *Buckmaster*. (3) The cases of *Reg.* v. *Shepherd* (4) and *Justices of Bedfordshire* v. *Overseers of St. Paul* (5) decide that the houses of governors of gaols necessary for the discharge of their duties are not rateable, and as said by Martin, B., in the latter of these cases, "it cannot be a criterion of the liability to be rated that the house is situated outside the gaol." The case of *Reg.* v. *St. Martin's, Leicester* (6), is identical with that of the present, except that the premises used there by Goodyer and Bail for police purposes were the property of the county instead of being only hired as in the present case, and such premises were held to be exempt from rateability, because being occupied for the purpose of the police they were to be considered as used for public purposes in the sense of government purposes within the principle of the *Mersey Docks Case*. (7) The only case against the appellant and on the authority of which the Queen's Bench Division decided that the appellant was rateable is that of *Gambier* v. *Overseers of Lydford*. (8) It was considered that there was there a beneficial occupation beyond what was required for the discharge of the duties of the officers, and Lord Campbell drew

(1) 3 Exch. D. 66.
(2) Law Rep. 1 Q. B. 72.
(3) Law Rep. 10 Q. B. 444.
(4) 1 Q. B. 170; 10 L. J. (M.C.) 44.
(5) 21 L. J. (M.C.) 228.
(6) Law Rep. 2 Q. B. 493.
(7) 11 H. L. Cas. 443.
(8) 3 E. & B. 346; 23 L. J. (M.C.) 89.

a line between what was within and what was outside the prison wall, but the better reasons for holding the officers not rateable notwithstanding they resided outside the prison wall are given by the dissenting judge, Coleridge, J.

Webster, Q.C., and *Bigham*, appeared for the respondents, but were not called upon.

LORD COLERIDGE, C.J. I am of opinion that this judgment must be affirmed. In order to establish the rateability of any premises there must be first of all a rateable occupation, and it has been held that where the occupation of the person whom it is proposed to rate is not really his, but is that of some one else, it is an occupation which will not do for rateability; but I am of opinion that that exemption cannot be maintained here. The occupation here is not that of a mere servant, and is not whilst it continues the occupation of some one else. It is however an occupation which might, I will assume, be determined at any moment, but it is none the less an independent occupation, and therefore primâ facie a rateable occupation. Secondly, to be rateable the occupation must be beneficial. Now I do not want to descant upon the word "beneficial." The difference between "beneficial" and "profitable" has been the subject-matter of much judicial discussion, but it has been determined that where the occupation is a beneficial one—that is, where the man has the benefit of it—and the occupation is of a kind which would make him rateable, then this second ground of exemption does not apply, and it seems to me that it does not apply here as the occupation is a beneficial one. Therefore upon those two grounds, primâ facie, this man is rateable.

Thirdly, there is a ground of exemption where the occupation, though in a certain sense beneficial, that is to say, for the benefit of the person who occupies, is nevertheless an occupation either of the Crown or for purposes of the Crown. The exemption from rateability has been determined to exist, in such a case as that, upon the ground put by Lord Cranworth, and the judges in the House of Lords in the *Mersey Docks Case* (1), namely, that where the Crown is not mentioned in the Act of Parliament the Crown

(1) 11 H. L. Cas. 443.

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is not bound by it, and consequently where the occupation has been considered to be that of the Crown, or for the purposes of the Crown, there rateability does not attach. Now with regard to this last ground, no doubt there have been decisions which, though they possibly may not be difficult to reconcile, would require time and thought before one could express accurately the exact determining line by which they should be maintainable and made consistent. It is most important that in rating cases where a line has been drawn by competent authority which is plain and intelligible to the persons who have to exercise the duty of rating, and which has been assented to in a variety of cases, we should adhere to such line unless we see some very good reason for differing from it. Now it appears to me that such a line has been drawn plainly, and so that overseers can clearly act upon it, in the case of *Gambier* v. *Overseers of Lydford.* (1) That case has decided that where there are public buildings, like a prison, station-house, or buildings of that description all occupied together, not by any individual personally, but by some public body as representing the Crown, who hold the whole as the Crown's building, or for the purpose of the government of the country, the Court will not look at whether this or that particular room or set of rooms is or not occupied so as to give a benefit to the persons who occupy, but if such room or rooms form an integral part of a whole which in itself is not rateable the persons who so occupy are not rateable. The Court, however, decided that where there were separate and distinct houses outside the prison wall and so apart from the general whole, the persons who occupied them, although they did so in and about the business of, and as officers connected with, the great whole, were rateable in respect of such occupation, inasmuch as they had a separate and beneficial occupation, and an occupation which was not actually the occupation of the Crown or for the purposes of the Crown. If the matter was res integra possibly I might think that in the opinion of the dissentient judge in that case of *Gambier* v. *Overseers of Lydford* (1) there were considerations which were more easy to overrule than to answer, but it is not res integra. That case has been accepted for a number of years, and

(1) 3 B. & B. 346; 23 L. J. (M.C.) 69.

it gives a plain and intelligible rule in a matter in which plainness and intelligibility are of the greatest possible value. I am of opinion that that case was rightly decided and ought to be upheld by this Court, and therefore that the appellant must fail.

BRETT, L.J. I am of opinion that unless this case can be brought within the exception with regard to Crown property, or property which is to be considered as if it were Crown property, the police superintendent is an occupier liable to be rated.

It is said that he is a mere servant, and that his occupation therefore is the occupation of some master of his, and certain parts of the special case are relied upon for the purpose of supporting that argument, but I am of opinion that those have been pressed too far. One can see plainly what is the nature of his occupation. He is a policeman, in the public employment of the county; and as part of his remuneration he has what are called "quarters," that is to say, he has the use of the whole of this house for the purpose of living in it with his wife and family; and no one else lives in the house, and he furnished it. It is said that there are paragraphs in the special case which shew that he has not the exclusive use of this house, and for this reliance is put on the paragraph which says, "The said house was liable to be used for such purposes connected with the police force as the chief constable might direct," and also on the following, "so long as the county authorities rented the house for the residence of the appellant he was compelled to live in the house, and was liable," not to the visitation of the chief constable who might come into any of the rooms, but "to be removed at any time from the said house and premises and from one police division to another." It seems to me that putting those two paragraphs together the meaning is that as part of his remuneration he is to have the exclusive use of this house for a residence. It is true that if the house is wanted for police purposes he may be liable, (not to have his family outraged by the presence of people at any moment or any hour,) but to be removed to another house; but as long as this house is given him, it is his own exclusive house, and is in his own exclusive occupation. Therefore, unless the

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case is brought within the exception, it seems to me that this superintendent is an occupier liable to be rated in respect of his occupation. Now with respect to whether this house is within the exception as being Crown property or property treated as such, it is obvious it is not Crown property, and therefore to be excepted it must come under one of the recognised heads of property which is treated as if it were Crown property. These have been enumerated, and they are public offices, such as the offices of the Secretaries of State, the Horse Guards, and the Post Office, and other similar offices. Besides these there is another class, namely, that of police courts and county courts, and also that of county buildings occupied at assize time by the judges. All the judges' lodgings which are not county buildings are not exempt from rating; for these are frequently in a house which at any other period of the year is occupied by the people to whom the house belongs, and these houses have never been exempt from rating. County buildings occupied by the judges at assize times, however, are exempt. Police stations also have been recognised as coming within the class to which the exemption applies, but it seems to me that the Courts ought not to extend such class, and that the case of *Gambier* v. *Overseers of Lydford* (1) points out the limit. If the tenement comes within one of the recognised class of buildings then will arise the question whether it is used for public purposes only, so as to bring it within the exemption from rating. But unless the tenement comes within one of the recognised class of buildings the other question does not arise, for the case of *The King* v. *Hurdis* (2) shews that the mere fact of the building being occupied by a servant of the Crown does not bring it within the exemption. Now *Gambier* v. *Overseers of Lydford* (1) is an authority that although the gaol or the police station is one of the recognised class of buildings, yet a house which is outside the prison wall and forms no part of such gaol or station, is not one of the recognised class and is not exempt although occupied by a servant of the Crown for the purpose of doing his duty. It seems to be a plain rule, and one which everybody can act upon, and which will keep the law of rating clear, whereas if departed

(1) 3 E. & B. 346; 23 L. J. (M.C.) 69. (2) 3 T. R. 497.

from for such considerations as have been put forward to-day, it will be almost impossible to get uniform decisions.

Therefore my judgment is based on this, that the occupation here has not been shewn to be the occupation of a building which is Crown property or of one of those buildings which, although not Crown property, has been recognised as a building which is to be treated as Crown property. The case of *Gambier* v. *Overseers of Lydford* (1) governs this case, and ought to be supported.

BOWEN, L.J. I am of the same opinion. With regard to the first point, I think that the appellant does not in any case occupy the premises in question as a servant. Then comes the question, what is his occupation? Now there are two opposite and conflicting principles to be borne in mind, the first is, that persons in beneficial occupation who fall within the statute of Elizabeth must be rated for their beneficial occupation, and the other is, that as the Crown is not named in the statute of Elizabeth, the lands and premises occupied by the Crown or by a servant of the Crown for the purposes of the Crown, are not liable to be rated. These being the two conflicting principles, it seems to me that the case of *Gambier* v. *Overseers of Lydford* (1), which has been acted upon since 1854, therefore for nearly thirty years, ought to be followed. That case I think gives a rule by which, when one gets a case on the line which divides these principles, one may be assisted in drawing the true inference of fact as to whether it falls on the one side or the other. What Lord Campbell says in *Gambier* v. *Overseers of Lydford* (1) is as follows:—"I come to the question of the official residences without the walls of the prison. I think the officers in those instances occupy beneficially, and are rateable. It cannot be disputed, I think, that they would be rateable if they paid rent for these houses, and received an allowance for the purpose of doing so. But I cannot see that it makes any difference whether they have a pecuniary allowance or a residence allotted to them. There is a benefit in each case, only the salary will be less in one case than the other, because the benefit is in

(1) 3 E. & B. 346; 23 L. J. (M.C.) 69.

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a different form. It does, I allow, appear to be a subtle distinction when we discriminate between the residences within the walls of the prison and those without, but whenever we find ourselves on the confines of conflicting principles the distinction must inevitably be subtle. The officers are in the prison merely for the purposes of the prison, but if we allowed the exemption without the prison we should have to allow it in cases where residence was in a different parish." That is the broad distinction which he says is proper to apply to these questions which are on the line between the two principles. Now, even if that is not a legal definition but is only a rule or guide by which to steer one's course when one is dealing with rating cases, still it is of the utmost importance, and one which, as the Lord Chief Justice and my Brother Brett have pointed out, this Court should not lightly unsettle. Therefore I must decide this case on the broad and sole ground that it is governed by the case of *Gambier* v. *Overseers of Lydford.* (1) With regard to the case of *Reg.* v. *St. Martin's* (2), I will only say that if it is inconsistent with the case of *Gambier* v. *Overseers of Lydford* (1), then it is wrong, because I think the case of *Gambier* v. *Overseers of Lydford* (1) ought to be upheld, and if it is not inconsistent with that case then it does not affect our decision.

Appeal dismissed.

Solicitors for appellant: *Ridsdale & Son, for Wilson & Hulton, Preston.*

Solicitors for respondents: *Goldring & Mitchell, for Cleaver, Holden & Co., Liverpool.*

(1) 3 E. & B. 346; 23 L. J. (M.C.) 69. (2) Law Rep. 2 Q. B. 493.

18 Jan 882

W. P.

[IN THE COURT OF APPEAL.]

1883
April 12.

ORMEROD AND ANOTHER *v.* THE TODMORDEN JOINT STOCK MILL COMPANY, LIMITED.

Flowing Water—Diversion of Stream—Alteration of Natural Flow—Action by Riparian Owner—Grant to non-Riparian Landowner.

A riparian owner cannot, except as against himself, confer on one who is not a riparian owner any right to use the water of the stream, and any user by a non-riparian proprietor, even under a grant from a riparian owner, is wrongful, if it sensibly affects the flow of the water by the lands of other riparian proprietors.

Stockport Waterworks Company v. *Potter* (3 H. & C. 300) approved.

FURTHER CONSIDERATION.

This was an action brought by the plaintiffs as riparian owners claming damages against the defendants for injuriously affecting the water of the stream, and claiming an injunction. The case, which was tried before Cave, J., and reserved for further consideration, was argued by

Crompton, Q.C., and *Aspland* (*Gully, Q.C.*, with them), for the plaintiffs, and *Ambrose, Q.C.*, and *Henn Collins* (*C. Russell, Q.C.*, with them), for the defendants.

Cur. adv. vult.

1882. June 26. CAVE, J. The plaintiffs in this case are riparian owners on the Burnley river, and have for many years been in the habit of conducting water from the river to their mill, and then using it for condensing purposes; and they complain that the defendants have injuriously affected their rights as such riparian owners, by conducting part of the water of the river to their (the defendants') mill, where some of it is used or lost, and the remainder is returned to the river in a heated condition, so that the quantity of the water when it arrives at the plaintiffs' land, is sensibly diminished and its quality sensibly deteriorated. The evidence adduced by the plaintiffs was very loose and vague. That of the defendants was more precise; and according to their witnesses, the following appear to be the facts of the case:—

The Burnley river is a small stream; but there was no very

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Cave, J.

satisfactory evidence as to what is the average quantity of water running down it. Three measurements taken by one of the defendants' witnesses in June and July, 1880, gave from 520 to 580 feet per minute, and other three taken by the same witness in January, 1882, gave from 1700 to 1850 feet per minute; another measurement taken in July, gave 400 feet per minute.

The defendants are not riparian owners; but by means of a pipe laid through the land of a riparian owner, about fifty yards above the plaintiffs' intake, they conduct thirty-eight feet of water per minute to their works. This water they use for condensing purposes, and after using it they return thirty-seven feet per minute to the river, three or four yards below the point at which it was taken out, and the remainder is consumed at the defendants' works, or lost in its passage to and from them. The quantity so returned is returned in a heated condition, generally at about 120° Fahrenheit. The quantity of water taken from the river by the defendants, and the degree to which it is heated, do not vary to any great extent, and consequently the effect produced by the return of the heated water varies according to the quantity of water in the river, and is greater, of course, in summer than in winter.

There was considerable conflict of testimony as to the effect produced upon the water at the plaintiffs' intake by what the defendants' company did. According to the evidence of Charles Edwin Sutcliffe, the only witness called for the plaintiffs who had compared the temperature of the water above the defendants' intake with that of the plaintiffs' intake, the temperature of the water at Patmos Bridge, on the 18th of December, 1879, was 71°, and at the plaintiffs' intake 90°. According to Mr. Hulse, one of the defendants' witnesses, the temperature at Patmos Bridge, on the 5th of July, 1880, was 70°, and that at the plaintiffs' intake 77°. The witness found similar results on the 25th, 28th, and 29th of June, 1880. On the same 5th of July, Mr. Buckley, another witness for the defendants, took the temperature of the water twice; on the first occasion it was 64° above the defendants' intake, and 70° at the plaintiffs' intake: on the second occasion it was 65° above the defendants' intake, and 66° at the plaintiffs' intake. Another of the defendants' witnesses, Mr. Wilson, took

the temperature on the 21st of June: on that occasion it was 76° above the defendants' intake, and 94° at the plaintiffs' intake. These tests shew a difference in the temperature of the water above the defendants' intake and in that at the plaintiffs' intake ranging from 1° to 19°. It must be remembered, however, that in addition to the defendants who pour this heated water into the brook fifty yards above the plaintiffs' intake, Messrs. Horsfall & Stevenson, and Messrs. Shepherd also pour heated water into the brook about thirty-three yards above the plaintiffs' intake. The quantity poured in by the defendants is, however, much greater than that of the other two mills; so that, if the quantity poured in by the defendants is taken to be represented by the figure 200, that poured in by Messrs. Shepherd will be represented by the figure 60, and that by Messrs. Horsfall & Stevenson by the figure 40.

The defendants attempted to shew that the effect produced at the plaintiffs' intake was almost entirely owing to the water from the other two mills; and one of their witnesses, Mr. Hulse, stated that on the 5th of July he took the temperatures above the defendants' intake and at the plaintiffs' intake twice,—once when all three mills were at work, and once when only the defendants' mill was at work; and that on the former occasion the difference was 7°, while on the latter it was only 1°. But, looking at the fact that the defendants pour twice as much water into the brook as that from the other two mills taken together, it seems impossible that the mere fact that the defendants' water is poured in 50 yards from the plaintiffs' intake, while that from the other two mills is poured in only 33 yards off, can account for such a difference. It is clear also that there are other causes which produce a difference; for, Mr. Hulse on the 5th of July, with all three mills working, found 70° above the defendants' intake and 77° at the plaintiffs' intake, while Mr. Buckley on the same day, also with all three mills working, found on one occasion 64° above the defendants' intake and 70° at the plaintiffs' intake, and on the other occasion 65° above the defendants' intake and 66° at the plaintiffs' intake.

The evidence of any actual damage to the plaintiffs from the abstraction by the defendants of the difference between 38 feet of

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water per minute taken out by them and 37 feet per minute returned was very unsatisfactory.

Upon this evidence I asked the jury,—first, assuming the defendants not to be riparian owners or entitled to the same rights as riparian owners, but to be mere strangers, does the use made by them of the water sensibly affect, or is it if continued capable of sensibly affecting, the plaintiffs' right to have the stream flow to their close undiminished in quantity and undeteriorated in quality? And, secondly, assuming the defendants to be riparian owners, or to be entitled to the same rights as riparian owners, is the use made by them of the water a reasonable use under all the circumstances of the case? These questions before being put to the jury were submitted to the counsel on either side, who stated that they could not suggest any alteration or addition.

The jury found, in answer to the first of these questions, "We are agreed that the water is affected, but the plaintiffs have failed to shew that for practical purposes they are sensibly damaged." They answered the second question in the affirmative.

Looking at the evidence and the questions put, I understand the first answer to mean that the plaintiffs' right as a riparian owner to have the water flow undiminished in quantity and undeteriorated in quality, without reference to any actual use they make of it, was sensibly affected; but that, looking to the use they actually made or could practically make of the water, they had not sustained and would not in the future sustain any substantial damage so long as the water is not affected further than it is at present affected by the defendants, or, in other words, that what the defendants do is not sufficient of itself to produce substantial damage to the plaintiffs, but that it is of a nature if done to a sufficient extent to produce substantial damage, and consequently that in that way the right of the plaintiffs is affected.

I cannot accept Mr. Collins' ingenious contention that the finding of the jury means that the defendants affect the water at the point at which they deal with it, and not at the plaintiffs' intake. Indeed, if that could be supposed to be their meaning, I should think it inconsistent with the evidence of the defendants themselves.

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The first contention of the defendants was that proof of substantial damage was necessary to the maintenance of the action, and consequently that upon this finding they are entitled to the verdict. Now, whatever the case might be if what is here complained of had been done by the defendants accidentally on a single occasion, I am of opinion that as the defendants claim to do this continuously as a matter of right, it is not necessary for the plaintiffs to prove that they have sustained actual damage: *Wilts and Berks Canal Navigation Co.* v. *Swindon Waterworks Co.* (1) If twelve other persons were to use the water in the same way and to the same extent as the defendants, it cannot be doubted that the plaintiffs would sustain substantial and serious injury: yet, if this contention of the defendants is correct, the plaintiffs would have no remedy against any one of the thirteen, because no one of them alone caused substantial damage. If I am right in this view, it is incumbent on the defendants to justify their interference with the plaintiffs' rights by shewing either that they are themselves riparian owners, in which case the finding of the jury in answer to the second of the above questions would entitle them to the verdict, or that, if not riparian owners, they are nevertheless entitled to affect the plaintiffs' rights to the same extent as they might have done if they were riparian owners.

Now, it is admitted that the defendants are not riparian owners, but they have a grant from a riparian owner of the right to lay a pipe into the bed of the river for the purpose of conveying water through the land of such riparian owner, and they have the unwritten consent of other owners of the land between the land of the riparian owner and the defendants' mill to their continuing this pipe through the lands of such intervening owners to their mill.

I will first consider a very curious contention put forward by Mr. Ambrose. He asserted that all persons who have lawful access to running water have a right to use it for all reasonable purposes, on the ground that running water is the common property of all mankind. For this proposition he cited *Liggins* v. *Inge* (2), where Tindal, C.J., lays it down that "water flowing in a stream, it is well settled, by the law of England, is publici juris.

(1) Law Rep. 9 Ch. 451; Law Rep. 7 H. L. 697.
(2) 7 Bing. 682, at p. 692.

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By the Roman law, running water, light, and air, were considered as some of those things which had the name of res communes, and which were defined 'things the property of which belongs to no person, but the use to all.' And by the law of England the person who first appropriates any part of the water flowing through his land to his own use has the right to the use of so much as he thus appropriates against any other." He also cited, Pollock, C.B., who in *Wood* v. *Waud* (1), says: "Flowing water as well as light and air are in one sense publici juris. They are a boon from providence to all, and differ only in their mode of enjoyment." So again, Parke, B., in *Embrey* v. *Owen* (2), says, "Flowing water is publici juris, not in the sense that it is a bonum vacans, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only." So, again, in *Wilts and Berks Canal Navigation Co.* v. *Swindon Waterworks Co.* (3), James, L.J., says, "All streams are publici juris, and all the water flowing down any stream is for the common use of mankind who live on the banks of the stream."

In the Roman law, running water, along with air and the sea, was deemed to be res communis; 2 Just. Inst. tit. 1, § 1, while rivers and harbours were res publicæ: 2 Just. tit. 1, § 2. Vinnius, in his commentary on the Institutes (4) describes the use of "aqua profluens" as "ad lavandum et potandum unicuique jure naturali concessa." Owing, however, to the greater demand for water for manufacturing purposes it has been found necessary in our law to limit the right to running water, and as is pointed out in *Mason* v. *Hill* (5), running water can no longer be said to be publici juris in the original sense of those words. In *Orr Ewing* v. *Colquhoun* (6), Lord Blackburn points out that the case of *Mason*

(1) 3 Ex. 748, at p. 775.
(2) 6 Ex. 353, at p. 369.
(3) Law Rep. 9 Ch. 451, at p. 457.
(4) Lib. 2, tit. 1, De aere, aqua profluente, &c.
(5) 3 B. & Ad. 304; 5 B. & Ad. 1.
(6) 2 App. Cas. 839, at p. 854

v. *Hill* (1) settled the law that the proprietor of land on the bank of a natural stream above the flow of the tide has, as incident to his property in the land, a proprietary right to have the stream flow in its natural state, neither increased nor diminished, and this quite independently of whether he has as yet made use of it, or, as it used to be called, appropriated the water. In *Miner* v. *Gilmour* (2), Lord Kingsdown says that, "by the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes and for his cattle, and this without regard to the effect which such use may have, in case of a deficiency, upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, or what may be deemed the extraordinary use of it, provided that he does not thereby interfere with the rights of other proprietors either above or below him. Subject to this condition, he may dam up the stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon them a sensible injury."

Since these decisions, the dicta of Tindal, C.J., in *Liggins* v. *Inge* (3), cited above, can no longer be regarded as law; nor can running water be properly said to be publici juris. This is pointed out in the notes to *Coryton* v. *Lithebye* (4), where it is said, "A mistaken notion appears to have prevailed for some time, that the right to flowing water is publici juris, and that the first occupant of it for a beneficial purpose may appropriate it and thereby gain a good title against all the world, excluding the proprietor of the land below, who may thereby be deprived of the benefit of the water, unless he has already applied the stream to some useful purpose."

There remains, however, a more serious contention, viz., that a riparian proprietor, as a part of his right to what Lord Kingsdown calls the extraordinary use of the water, may sell or give it to

(1) 3 B. & Ad. 304; 5 B. & Ad. 1.
(2) 12 Moore, P. C. 131, at p. 156.
(3) 7 Bing. 682.
(4) 2 Wms. Saund. 116, n (*i*).

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persons who are not riparian proprietors, subject to the limitation which applies to the use of it by himself for extraordinary purposes, viz., that he does not thereby interfere with the lawful use of the water by other proprietors, and inflict upon them a sensible injury.

As to this contention, it seems to me that the decision of the majority of the Court in *Stockport Waterworks Co.* v. *Potter* (1), is in point as expressly deciding that a riparian owner cannot, except as against himself, confer on one who is not a riparian owner any right to use the water of the stream, and that any user of the stream by a non-riparian proprietor, even under a grant from a riparian proprietor, is wrongful if it sensibly affects the flow of the water by the lands of other riparian proprietors.

The case of *Stockport Waterworks Co.* v. *Potter* (1) was discussed in *Nuttall* v. *Bracewell* (2) and also in *Holker* v. *Porritt* (3), but is not, I apprehend, overruled by either of those cases, and is therefore binding upon me; and in accordance therewith I hold that the defendants have not acquired any rights as against the plaintiffs to the use of the water of the Burnley river. There must therefore be judgment for the plaintiffs.

Then as to the claim to an injunction. The defendants have offered to submit to an injunction so far as the sale of the water by them to Fielding is concerned. As regards the use by the defendants themselves, I am of opinion that no injunction should be granted. In the first place, the plaintiffs have acquiesced for a long time in the user of the water by the defendants. In the second place, the amount of water abstracted by the defendants and the extent to which it is heated, are capable of being ascertained; and therefore the observations of Fry, J., in *Pennington* v. *Brinsop Hall Coal Co.* (4) as to the injury varying from day to day, do not apply with the same force. In the third place, the plaintiffs have accepted compensation from Messrs. Horsfall & Stevenson and from Messrs. Shepherd, thus shewing that in their opinion it is not impossible to fix the compensation for the future injury.

(1) 3 H. & C. 300. 10 Jur. N.S. 1006
(2) Law Rep. 2 Ex. 1
(3) Law Rep. 8 Ex. 107; Law Rep. 10 Ex. 59.
(4) 5 Ch. D. 769, at p. 773.

I have not been asked by either of the parties to award damages by way of compensation for the future injury. Indeed, I have been asked by the plaintiffs not to do so, and therefore I make no such award.

If, however, I ought to make such an award, then, looking at the facts that the defendants make use of double the quantity of water which the other two mill-owners do, but that their outlet is fifty yards from the plaintiffs' intake, while the outlet of the other two mills is only thirty-three yards from the plaintiffs' intake, I should arrive at the conclusion that the amount the defendants ought to pay should be calculated proportionately to that which has been fixed by agreement between the plaintiffs and the other two mill-owners, and should therefore be 200*l.* As I have said, however, I abstain from awarding this sum, and only name 200*l.* in order that, if the Court of Appeal should be of opinion that I ought to have awarded compensation for the future injury, they may be in possession of my views as to what the amount of that compensation ought to be.

There must therefore be judgment for the plaintiffs, with costs, and an injunction to restrain the defendants from continuing to convey the water to Fielding, or permitting him to take it through their pipes.

A. M.

The defendants appealed.

1883. April 9, 12. *Charles Russell, Q.C.*, and *Ambrose, Q.C.* (*Henn Collins*, with them), for the defendants. The judgment of Cave, J., cannot be upheld: the plaintiffs are not riparian owners, and the defendants are treated as merely having the license of a riparian owner. The real question is how the judgment is to be entered upon the findings of the jury; they found in effect that the water had been abstracted and heated, but that the plaintiffs had sustained no sensible damage. Upon these findings the action is not maintainable; but Cave, J., held that the latter finding was immaterial, and directed judgment to be entered for the plaintiffs. Even as licensees the defendants were entitled to take the water from the river: running water is publici juris. It may be that running water is not a bonum vacans, and the

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passages of the judgment in *Liggins* v. *Inge* (1), which appear to lay down that running water may be appropriated, must be taken to have been overruled by the subsequent decisions in *Mason* v. *Hill* (2) and *Embrey* v. *Owen* (3); but these latter authorities are not opposed to the doctrine that all may reasonably use flowing water who have a right of access to it. For the defendants it is contended that the licensee of a riparian proprietor has the same rights as a riparian proprietor, and although it is unnecessary for the defendants to establish the proposition, the right to abstract flowing water may well exist as a right in gross. The plaintiffs will rely upon the *Stockport Waterworks Co.* v. *Potter* (4), but the judgment of the majority of the judges in that case has been qualified by subsequent decisions, although perhaps it has not been overruled.

[BRETT, M.R. To how many persons can a license to abstract running water be granted by the same riparian owner?]

To as many as apply for it, provided the flow of water in the river is not diminished, or, as it may be otherwise stated, provided the benefits conferred on the grantees do not exceed the rights of the grantor.

Further, the defendants may fairly claim to be riparian owners, for the license to lay down the goit is sufficient to invest them with that character.

[BRETT, M.R. Surely that license creates a mere easement, which does not carry any property in the soil.]

By virtue of the license the defendants have become owners of so much of the soil as is necessary to support the goit.

The cases, when they are duly examined, are not at variance with the contention for the defendants. In *Stockport Waterworks Co.* v. *Potter* (4), the law was correctly laid down by Bramwell, B., the dissentient judge; but nothing in the decision itself is adverse to the present defendants' contention: it was merely held that a grantee in gross of a riparian owner could not sue in his own name for a pollution of a river. The doctrine contended for by the plaintiffs may lead to absurd results: suppose that a riparian owner who has a mill standing near

(1) 7 Bing. 682, at pp. 692, 693.
(2) 5 B. & Ad. 1.
(3) 6 Ex. 353.
(4) 3 H. & C. 300.

a river grants the mill with the right to take water from the river to a trustee for the benefit of himself and other persons, partners with himself in the business carried on at the mill, and suppose that at the time of the grant he retains for his own use the land lying between the river and the mill; can it be said that the grant to the trustee of the right to take water is void as against the other riparian owners?

A riparian owner has a right to every kind of enjoyment of the river. In *Earl of Sandwich* v. *Great Northern Ry. Co.* (1), the facts appear to have been that a railway company whose line crossed a stream in the immediate neighbourhood of one of their stations, took water for supplying their engines and for the general purposes of the station; and Bacon, V.C., held that the company, as riparian owners, were entitled to take a reasonable quantity of water for their purposes, and that the quantity taken was reasonable. In *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (2), it is laid down by Lord Cairns, L.C., that the use of running water for manufacturing purposes may be so reasonable that no just complaint can be made of it: in the present case the defendants only desire to use the river for manufacturing purposes.

[BRETT, M.R. In that case, Lord Cairns in substance adopts the language of Lord Kingsdown in *Miner* v. *Gilmour* (3); but I observe that in *Lord Norbury* v. *Kitchin* (4), the remarks of Lord Kingsdown were not fully assented to by the Court of Exchequer.]

In *Nuttall* v. *Bracewell* (5), it was held by Pollock, C.B., and Channell, B., that where a natural stream is divided into two branches, the owner of the land, through which the new course passes, is a riparian owner.

[BRETT, M.R. Certain rules of law apply to riparian owners so as to modify what would otherwise be their rights: can those rules apply between a riparian owner and one who is not, even although he is the grantee of a riparian owner?

LINDLEY, L.J. *Laing* v. *Whaley* (6) is a case somewhat

(1) 10 Ch. D. 707.
(2) Law Rep. 7 H. L. 697, at p. 704.
(3) 12 Moo. P. C. 131, at p. 156.
(4) 9 Jur. (N.S.) 132.
(5) Law Rep. 2 Ex. 1.
(6) 3 H. & N. 675, 901.

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resembling this: it appears to have given rise to a great diversity of opinion amongst the judges.]

In *Holker* v. *Porritt* (1), it was held that the owner of a mill supplied with water running from a river through an artificial channel, could maintain an action against a riparian owner for obstructing the flow of water.

Gully, Q.C. (*C. Crompton, Q.C.*, and *Aspland*, with him) for the plaintiffs.

[BRETT, M.R. For the purpose of arguing this case, it may be assumed on behalf of the plaintiffs, that the defendants have no land adjoining the stream, and that they are entitled to merely an easement.]

For the defendants it has been in effect contended that by virtue of the grant from a riparian owner, they have the same rights as riparian owners. This contention cannot be maintained: the only authority that can be cited in support of it is the judgment of Bramwell, B., in *Stockport Waterworks Co.* v. *Potter* (2); but his view was dissented from by the other members of the Court. *Nuttall* v. *Bracewell* (3) is not in point for the present defendants; it was merely a case where a stream had been divided into two courses. The deed, under which the defendants claim, does not shew that Scholefield the grantor meant to transfer his right to take water from the river. After the decision of the House of Lords in *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (4), it will be difficult to contend that it is lawful for a riparian owner to sell the right to take water; that case in effect affirms the judgment of the majority of the Court of Exchequer in *Stockport Waterworks Co.* v. *Potter*. (2) [He was then stopped.]

Henn Collins, was called upon to reply on behalf of the defendants.

[BRETT, M.R. The defendants have to meet two difficulties: first, they are not riparian owners; secondly, they claim, not an ordinary, but an extraordinary, use of the water, and therefore they are bound not to lessen the quantity or injure the quality of the water in the stream.]

(1) Law Rep. 8 Ex. 107; Law Rep. 10 Ex. 59.

(2) 3 H. & C. 300.

(3) Law Rep. 2 Ex. 1.

(4) Law Rep. 7 H. L. 697.

The question whether the use of a river is ordinary or extraordinary depends upon the development of trade in its neighbourhood, and upon the use to which it is put by adjoining owners: thus it was held to be lawful for a railway company to take water from a stream for the purpose of carrying on the traffic over their line: *Earl of Sandwich* v. *Great Northern Ry. Co.* (1) The decision in *Nuttall* v. *Bracewell* (2) supports the arguments for the defendants, although the reasoning of Pollock, C.B., and Channell, B., may be against it.

[BRETT, M.R. How can the goit of the defendants be deemed to be part of the river? Scholefield granted only an easement.]

At all events the plaintiffs are not riparian owners, and cannot maintain this action.

BRETT, M.R. I think that this judgment must be affirmed. Upon the argument before us two points have been satisfactorily established: first, there is ample evidence that the plaintiffs are riparian owners, and in my opinion we are bound to treat them so: secondly, I think that there is no evidence that the defendants are riparian owners. These circumstances being taken as proved, we must determine how judgment must be entered upon the findings of the jury. We must ascertain what was the real meaning of those findings; and if doubts can be entertained as to the meaning, we must refer to those persons who were present at the trial, and who must know what was meant, and the judge who presided at the trial must know best what was meant. I must assume the meaning of the findings to be such as is stated by the judge; and I take it that the jury have found that the water of the river is sensibly affected in both quantity and quality, but that upon looking at the use made of the water the plaintiffs had not sustained damage, and would not sustain damage, so long as the water of the river is not affected further than it is at present. It must be assumed that the water has been sensibly affected in temperature and in quantity, but that owing to the use to which the water is put the acts of the defendants do not injure the plaintiffs. As I have said, the defendants are not riparian owners: the plaintiffs are owners of a wall facing the stream and

(1) 10 Ch. D. 707. (2) Law Rep. 2 Ex. 1.

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of a strip of land behind it six feet in depth: this abuts on the river, and is sufficient to make the plaintiffs riparian owners. The question is whether, it being assumed that the plaintiffs are riparian owners, they can maintain this action. Inasmuch as the defendants are using the water for manufacturing or extraordinary purposes, that is, not for original purposes, it is said that it does not matter whether the river is used reasonably, but they must take care not to inflict a sensible injury upon the other riparian owners. This view has been urged upon us by the counsel for the plaintiffs, and I confess that I was at one time disposed to assent to it; but I have been shaken by the argument that has been addressed to us in reply on behalf of the defendants, and it may be that the question what is an extraordinary use, depends upon the development of the trade in the neighbourhood, and on the use to which the water of rivers is put in the adjoining district. I am not prepared to negative that argument, but rather I am prepared to adopt it. The diffusion of trade may make a great change as to what constitutes an extraordinary use of running water. But I do not decide this point, and it is unncessary to express any opinion about it because the defendants are not riparian owners. The question, whether the defendants are or are not riparian owners, depends on *Nuttall* v. *Bracewell* (1) and *Holker* v. *Porritt* (2) rather than upon *Stockport Waterworks Co.* v. *Potter*. (3) In those two cases the question between the parties depended upon riparian ownership: at least, this was the view of some of the judges who took part in the decisions. It was contended in *Nuttall* v. *Bracewell* (1) that a riparian owner could not confer his own rights upon another person; but Pollock, C.B., and Channel, B., held that by the construction of the goit the course of the river was altered, a new channel was created, and thenceforwards the stream ran in two channels or branches; and these judges held that because the stream flowed in two branches, the owner of the land along which the new branch passed was a riparian owner. The case was decided on the ground that the new stream was a branch of the river. That was not a case where a mere easement had been

(1) Law Rep. 2 Ex. 1.

(2) Law Rep. 8 Ex. 107; Law Rep. 10 Ex. 59.

(3) 3 H. & C. 300. 10 Jur. N.S. 1005.

created, where a mere pipe had been laid in the ground. In *Holker* v. *Porritt* (1) the judges of the Court of Exchequer appear to have acted upon somewhat similar reasoning, although in the Exchequer Chamber the judgment was affirmed on a different ground. Neither of these cases fully defines what is a riparian owner: in the present case the question depends to some extent upon the facts of the case. Scholefield granted by deed certain rights to the defendants: the deed is drawn up in somewhat confused language, because Scholefield wished not to make himself liable to other persons: but it is clear that he did not convey the ownership of any part of the river. The defendants have taken nothing in the soil which abuts upon the river: they do not own a single inch of the bank: they are not riparian owners: then are they entitled to the rights of riparian owners? The answer depends upon whether the decision of the majority of the Court of Exchequer in *Stockport Waterworks Co.* v. *Potter* (2) can be supported: we must take the ground of the decision to be that which is stated. The question there was whether the rights of a riparian proprietor can be assigned; and the following doctrine was laid down in the judgment (3): "There seems to be no authority for contending that a riparian proprietor can keep the land abutting on the river, the possession of which gives him his water-rights, and at the same time transfer those rights or any of them, and thus create a right in gross by assigning a portion of his rights appurtenant. It seems to us clear that the rights which a riparian proprietor has with respect to the water are entirely derived from his possession of land abutting on the river. If he grants away any portion of his land so abutting, then the grantee becomes a riparian proprietor, and has similar rights. But if he grants away a portion of his estate not abutting on the river, then clearly the grantee of the land would have no water-rights by virtue merely of his occupation. Can he have them by express grant? It seems to us that the true answer to this is that he can have them against the grantor, but not so as to sue other persons in his own name for an infringement of them." This passage contains the reason of the decision of the majority.

(1) Law Rep. 8 Ex. 107; Law Rep. 10 Ex. 59.

(2) 3 H. & C. 300.

(3) 3 H. & C. pp. 326, 327.

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The grantee has his rights as against the grantor, but not as against any one besides. Bramwell, B., dissented; and no doubt we ought to carefully consider any objection coming from him. In *Nuttall* v. *Bracewell* (1) it was held the plaintiff was a riparian proprietor in respect of a goit; but Pollock, C.B., and Channell, B., did not alter the opinion which they had formed in *Stockport Waterworks Co.* v. *Potter* (2); they adhered to the ground of their judgment in that case. They pointed out that the rights of a riparian proprietor can be easily ascertained, but that one riparian proprietor may have no means of ascertaining who are the grantees of another proprietor: they repeated that the grantee of a riparian proprietor can sue only the grantor for any interference with him. I am prepared to say that for the reasons given by Pollock, C.B., and Channell, B., I agree with the judgment of the majority of the Court in *Stockport Waterworks Co.* v. *Potter* (2): the grant of a right to flowing water by a riparian owner is valid only against himself and cannot confer rights as against others. The law as to flowing water is part of the common law of England; but it only exists as between riparian owners; it does not extend to those whose lands do not abut on streams and rivers.

LINDLEY, L.J. I think that the judgment of Cave, J., ought not to be reversed. We must take it that the plaintiffs are riparian proprietors. But with respect to the defendants, are they riparian proprietors, and have they any possession or ownership of the soil abutting on the river? I think that this question must be answered in the negative. Scholefield granted by deed the power to lay down pipes, he did not in terms grant the right to take the water, for he intended no doubt to protect himself from any consequences of a grant like that. Notwithstanding the execution of the deed Scholefield could take as much water out of the river as he pleased, and if we were to hold that the defendants are riparian proprietors, it would follow that a riparian proprietor might grant rights over flowing water to any number of persons, and that these rights would be of an unlimited kind. Then have the defendants such a right to the flow of water from

(1) Law Rep. 2 Ex. 1. (2) 3 H. & C. 300.

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Lindley, L.J.

the river that they are justified in committing the acts complained of by the plaintiffs? The answer to that depends on the *Stockport Waterworks Co.* v. *Potter*. (1) I think that the majority of the Court were right in the view which they took, and I am unable to concur in the opinion of Lord Bramwell who dissented. I think that it cannot be said that the defendants have the same rights as riparian proprietors. Upon the findings of the jury the plaintiffs had a good cause of action; the judgment of Cave, J., was right, and this appeal ought to be dismissed.

BOWEN, L.J. I am of the same opinion. It has been found by the jury that the plaintiffs are riparian owners; and if the finding of the jury is wrong, it must be corrected by a motion for a new trial. Then have the plaintiffs a right of action against the defendants? Running water is not a bonum vacans, it is only publici juris, as is pointed out in the judgment in *Embrey* v. *Owen*. (2) It has long been established that running water is not the subject of property, and that the first occupant cannot acquire an exclusive right to it. The only right annexed to it is to have it flow in some course; and it has been long held that adjoining owners are entitled to have the water flow in the natural course of the stream. In the present case the jury have found that the plaintiffs had the right to such a flow of water; unfortunately the jury have not answered the questions in the terms put to them; but the judge has put his construction upon the answer. I think that construction right, and I feel myself bound to follow it. I will discuss the questions arising in this case upon that basis. It becomes therefore imperative to see what the defendants have really done, and whether they are themselves riparian owners or only strangers, because their rights of interfering with the plaintiffs' flow of the water may differ accordingly. It has been contended that the law has been incorrectly stated by Cave, J., and that a stranger may have the same right to interfere with the flow of a stream as a riparian proprietor. Upon referring to the judgment delivered on behalf of the Privy Council by Lord Kingsdown in *Miner* v. *Gilmour* (3), it appears to be there

(1) 3 H. & C. 300. (2) 6 Ex. 353, at p. 369.
(3) 12 Moo. P. C. 131, at p. 156.

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Bowen, L.J.

laid down that a riparian owner cannot for extraordinary purposes use a stream so as to interfere with the rights of other proprietors either above or below him, although it seems to have been thought that a riparian proprietor cannot complain of interference with his rights if another riparian proprietor for ordinary purposes uses even the whole of the stream. I will assume therefore that the plaintiffs must submit to a reasonable user of the stream by other riparian proprietors, and that manufacturing purposes are not extraordinary purposes; it is not necessary to discuss the view whether they are or must be extraordinary; I will assume these points against the plaintiffs. But are the defendants riparian proprietors? They have no land on the bank of the stream, they have no right to the soil; they have only the right to lay pipes conferred upon them by some one who is a riparian owner. Under these circumstances can the defendants claim to be riparian owners? In the first place, can a riparian proprietor transfer his rights to a stranger? He can allow a stranger to come down upon the bank of the river; he can confer rights as against himself; but can he confer rights as against others? In *Stockport Waterworks Co.* v. *Potter* (1) the majority of the Court of Exchequer thought that the rights of a riparian owner were so annexed to the soil that they could not be granted away; they considered these rights as appurtenant to the land. Whether the original right of a riparian proprietor to the flow of water is in virtue of his ownership of land upon the bank, or his presumed title to the bed of the river usque ad medium filum, the only legitimate user by him of the water, other than such rights as he may have acquired by prescription, is for purposes connected with his ordinary occupation of the land upon the bank. The right of a riparian owner to the flow of water may, in this respect, possibly be compared to a right of common appurtenant for cattle levant and couchant upon land; this right cannot be aliened from the land; whereas a right of common appurtenant for a number of beasts certain may be assigned. I confess that my impression is against the argument for the defendants in the present case, and that I incline to think that the rights of a riparian proprietor are inseparably

(1) 3 H. & C. 300.

attached to the soil. However, in the view which I take of this case it is unnecessary for me to pronounce any opinion on this question; for by the terms of the deed no rights to the flow of water, or to interfere with the flow, have been transferred to the defendants; they have merely an easement over the land. The deed does not transfer Scholefield's rights to the defendants; it does not confer upon them the rights of riparian owners; it does not take them out of the category of strangers; I think that Scholefield intended to stop short of granting away the rights of a riparian owner, and that he meant to license the defendants to enter and lay a pipe on his soil but nothing more, and if the defendants are mere strangers, what right have they to interfere with the flow of water at all? I decide this case on the ground that the plaintiffs are riparian owners and that their right to the flow of water in the stream has been injuriously affected by the defendants who are not riparian owners. As I have before said, I do not pronounce any opinion upon the question, whether the user by the defendants was reasonable or was for extraordinary purposes.

Judgment affirmed. (1)

Solicitors for plaintiffs: *Torr, Janeways, Gribble, & Oddie, for A. G. & T. W. Eastwood, Todmorden.*

Solicitors for defendants: *Pritchard, Englefield, & Co., for Grundy, Kershaw, & Co., Manchester.*

(1) The plaintiffs had given a cross notice of appeal against the refusal of Cave, J., to grant an injunction; but after judgment had been given dismissing the defendants' appeal, it was agreed between the parties that the defendants should pay to the plaintiffs the sum of 200*l.* in lieu of an injunction upon certain terms as to costs, and that this arrangement should settle all matters in difference.

J. E. H.

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April 19.

[IN THE COURT OF APPEAL.]

THE ALEXANDRIA WATER COMPANY, APPELLANTS; MUSGRAVE (SURVEYOR OF TAXES), RESPONDENT.

Revenue—Income Tax — Company—Debenture — Coupons payable Abroad—Deduction from Tax of Sums payable Abroad—5 & 6 Vict. c. 35, ss. 100, 102, 159, & Schedule D.

An English company carrying on their business in Alexandria where their gains and profits were earned were held to be properly assessed to the income tax in respect of the whole of the profits of the concern, without any deduction on account of the interest on the debenture bonds of the company paid to the holders of such bonds in Alexandria; there being nothing in ss. 102 and 159 of the Income Tax Act (5 & 6 Vict. c. 35), to limit rule 4 in s. 100, which states that "no deduction shall be made on account of any annual interest or any annuity or other annual payment payable out of such profits or gains."

CASE stated for the opinion of the Court by the Commissioners for the special purposes of the Income Tax Acts.

The Alexandria Water Company, Limited, appealed at a meeting of the said Commissioners in January, 1881, against an assessment of 25,600*l.* made in respect of the profits of the company by the district Commissioners for the parish of St. Margaret, Westminster. The company claimed as a deduction from the sum assessed the amount of 7,695*l.*, being interest on debenture bonds paid to foreigners residing in Egypt.

The special Commissioners decided that the company being an English company, were liable to pay income tax on the whole profits of the concern, irrespective of the manner and places in which such profits were distributed, and they confirmed the assessment in the sum of 25,600*l.* (1)

The Queen's Bench Division gave judgment for the respondent, the Surveyor of Taxes. The company appealed.

A. Charles, Q.C., and *F. R. Radcliffe*, for the appellants. The

(1) It was admitted, though not stated in the case, that the company resided in England, where they had a registered office, and that they carried on their business in Alexandria, where their land and property were situate, and where their profits were earned. The debenture bonds alluded to in the case were in the usual form of mortgage bonds, charging the lands and property of the company with the moneys in respect of which they were issued, and having interest coupons attached by which the interest was made payable in London or in Alexandria.

company say that they are not liable to pay income tax upon the interest paid on their debenture bonds to the holders in Alexandria. Every such holder is entitled to receive the whole sum payable by the coupon without any deduction, and therefore, if the company pay the income tax they will not be able to get it back from any one. It is different with respect to the debenture holders in England, because in their case the coupon is paid less the tax, and so the company who only act as collectors for the Government suffer no injury. The statute under which the question arises, is 5 & 6 Vict. c. 35, and Schedule D, gives the tax upon the annual profits or gains accruing to a person resident in England, from property or trade wherever situate, and upon the annual profits or gains accruing to a person not resident in England, from any property in or trade exercised in England. The recipient of the coupon in Alexandria is not within either of these classes, and the interest which the company have to pay on the debenture bonds is a debt or liability which ought to be deducted before they can be charged under Schedule D, with the tax on their profits. It is no doubt paid by the company out of their profits as long as they make profits, but it is paid not as a dividend but in pursuance of the debenture obligation, and would have to be paid if there were no profits at all, or the waterworks and property of the company might be seized by the debenture holders. The question, however, very much turns on ss. 100, 102 and 159 of the statute. Section 100 sets out the rules under which the duties granted in Schedule D are to be assessed. The first case relates to duties charged in respect of any trade, &c., not contained in any other schedule, and then follow rules for ascertaining the duties, and amongst them rule 4, on which the Crown relies, and which is this, viz., "in estimating the amount of the profits and gains arising as aforesaid, no deduction shall be made on account of any annual interest or any annuity or other annual payment payable out of such profits or gains."

This 4th rule is explained by s. 159 (1), which shews that the

(1) The following is s. 159: "And be it enacted that in the computation of duty to be made under this Act in any of the cases before-mentioned, either by the party making or delivering any list or statement required as aforesaid or by the respective assessors or commissioners, it shall not be

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rule is to be limited to cases in which the company get back the income tax from the recipient. That such is the intention of the legislature is strengthened by s. 102 (1), which makes the

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lawful to make any other deductions therefrom than such as are expressly enumerated in this Act, nor to make any deduction on account of any annual interest, annuity, or other annual payment to be paid to any person out of any profits or gains chargeable by this Act, in regard that a proportionate part of the duty so to be charged is allowed to be deducted on making such payments, nor to make any deduction from the profits or gains arising from any property herein described, or from any office or employment of profit on account of diminution of capital employed or of loss sustained in any trade, manufacture, adventure, or concern, or in any profession, employment, or vocation."

(1) The following is s. 102: "And be it enacted that upon all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable within or out of Great Britain either as a charge on any property of the person paying the same by virtue of any deed or will, or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same shall be received and payable half yearly or at any shorter or more distant periods, there shall be charged for every twenty shillings of the annual amount thereof the sum of sevenpence, without deduction according to and under and subject to the provisions by which the party in the third case of Schedule (D), may be charged, provided that in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act no assessment shall be made upon the person entitled to such annuity, interest, or other annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment without distinguishing such annual payment, and the person so liable to make such annual payment, whether out of the profits or gains charged with duty, or out of any annual payment liable to deduction or from which a deduction hath been made, shall be authorized to deduct out of such annual payment at the rate of sevenpence for every twenty shillings of the amount thereof, and the person to whom such payment liable to deduction is to be made shall allow such deduction at the full rate of duty hereby directed to be charged upon the receipt of the residue of such money, and under the penalty hereinafter contained, and the person charged to the said duties having made such deduction shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable; but in every case where any annual payment as aforesaid shall by reason of the same being charged on any property or security in Ireland, or in the British plantations, or in any other of Her Majesty's dominions, or on any foreign property or foreign security, or otherwise, be received or receivable without any such deduction as aforesaid, and in every case where any such payment shall be made from profits or gains not charged by this Act, or where any interest of money shall not be reserved or charged or payable for the period of one year, then and in every such case there shall

company collectors for the Government with regard to interest upon their debenture bonds by enabling them to deduct the income tax from the payment of such interest to the debenture holder, but that is only where such holder is liable to the tax. The present case is dealt with by the latter part of s. 102, which begins with the words "but in every case where any annual payment as aforesaid shall by reason of the same being charged upon any property in Ireland," &c., "or on any foreign property or foreign security or otherwise be received or receivable without any such deduction as aforesaid." In that case the Act charges the duty on the recipient of the interest or annual payment and not upon the person who pays it.

[BRETT, M.R. How do you apply s. 159 to rule 4 of s. 100? How do you modify the language of that rule by reading in a part of s. 159?]

"No deduction shall be made on account of any annual interest or any annuity or other annual payment payable out of such profits or gains," "in regard that," that is to say, "because" or "inasmuch as" "a proportionate part of the duty so to be charged is allowed to be deducted on making such payments."

[BOWEN, L.J.:—Surely it is not giving the reason why no deduction is to be made. Did you ever know of an Act of Parliament after enacting a thing say why the legislature thought it reasonable to enact it? "In regard" here is not an expression of the reason of the legislature, but is to render impossible an erroneous view which might otherwise be entertained by the person computing as to his being entitled to make the deduction.]

The reason why no such deduction is to be made is because the

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be charged upon such interest, annuity, or other annual payment as aforesaid the duty before mentioned according to and under and subject to the several and respective provisions by which the duty in the third case of Schedule (D) may be charged: Provided always, that where any creditor on any rates or assessments not chargeable by this Act as profits shall be entitled to such interest, it shall be lawful to charge the proper officer having the management of the accounts with the duty payable on such interest, and every such officer shall be answerable for doing all acts, matters, and things necessary to a due assessment of the said duties, and payment thereof, as if such rates or assessments were profits chargeable under this Act, and such officer shall be in like manner indemnified for all such acts as if the said rates and assignments were chargeable."

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recipient is the person who is to pay the tax. The proper inference to be drawn from this 4th rule, when considered with ss. 102 and 159, is that the company are not to be taxed in respect of interest on debenture bonds paid to holders abroad, because such holders are not liable to the tax.

Sir F. Herschell, S.G., and *Dicey*, appeared for the respondent, but were not called upon.

BRETT, M.R. In my opinion we must affirm the decision of the Divisional Court. Now the first point seems to me to be what is it that this company desire should be done. The company claim to be allowed to deduct from the sum to which they are assessed the amount of 7695*l.* paid by them as interest on debenture bonds to foreigners residing in Egypt. Therefore, although the company admit that they are liable to be assessed to the income tax, they complain that they have been assessed upon a wrong amount, that is to say, that in assessing the amount something ought to have been deducted which has not been deducted, namely, interest paid on certain debentures given for money borrowed by the company. Now out of what fund is such interest paid by the company? The only fund out of which the company can pay is the money they receive by way of water rents, which is what the company gain by their trade; it is not the net profits but the gains of the company. It is true that by the words of the debenture bond the debenture holder has another security, that is, the property of the company to fall back upon if he is not paid his annual interest, but the interest which is paid him is paid out of that, which is the only fund the company have in their hands to pay, namely, the money derived from their gains. Therefore what the company are contending for is that, in estimating the amount of the profits and gains for the purposes of assessment to the income tax, a deduction should be made on account of certain annual interest which is payable out of their gains. But then, it being admitted that the company are to be assessed, and the only contest being upon what amount, there is the 4th rule of s. 100 of 5 & 6 Vict. c. 35, which says that in estimating that which is the subject-matter of estimation in this very case "no deduction shall be made on account of any annual interest payable out of such profits or gains." If, there-

fore, the annual interest which this company now contend ought to be deducted were deducted, it would be in direct contradiction to the grammatical and ordinary plain English reading of this 4th rule. Then is there anything in the statute which entitles the Court to read that 4th rule in any other way than according to its ordinary grammatical construction, or according to its ordinary meaning in the English language? It is said that s. 102 enables and obliges the Court to read it otherwise than according to its ordinary and grammatical construction; but s. 102 does not apply to the same operation or time as s. 100 does, but to operations which arise or are to be performed after all that is stated in s. 100 has been fulfilled. Under those circumstances it seems to me we cannot read anything from s. 102 into s. 100.

As to the 159th section that may, and probably does, apply to the same time as rule 4 of s. 100, but as was pointed out by my Brother Bowen, it seems to me that there is nothing in s. 159 which can be read into the 4th rule of s. 100 so as to limit its operation. The argument on behalf of the appellants therefore seems to be reduced to one of hardship. I do not deny that there is hardship, assuming that the company cannot get payment from the foreign debenture-holder. I am unwilling to give an opinion whether the foreign debenture-holder can be made to repay the company, because such debenture-holder is not now before us, but I confess I have a strong suspicion that those who drew this Act meant, as far as English legislation can do so, to make him liable; but whether the foreign debenture-holder can, be made to pay or not, that is to say, whether the company in paying him can or not deduct the tax, is immaterial. If they can, there is no hardship; if they cannot, the hardship is imposed upon them by the plain terms of the Act. I therefore agree with the judgment of the Queen's Bench Division.

COTTON, L.J., and BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors for appellants: *Radcliffes, Cator, & Martineau.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

W. P.

1883
May 24.

DYKE *v.* CANNELL.

Practice—Referee—Application to set aside Findings—With what Time and how made—Judicature Act, 1873, *ss.* 56–58—*Order XXXVI., rule* 34—*Order XXXIX. rule* 1 *a—Order LIII., rules* 2, 3.

Where on a reference under s. 57 of the Judicature Act the unsuccessful party desires to question the findings of the referee, the proper course is to move the Court on notice under Order LIII. to the other party, and such a motion need not be made within the time limited by Order XXXIX. rule 1A for moving for a new trial in an action tried by a jury.

THIS was an action to recover arrears of rent which, after statement of defence and joinder of issue, was referred by an order of a judge to one of the official referees for trial of all questions of fact in the action.

The findings of the official referee were filed on the 13th of April, 1883. The plaintiff gave notice of motion for judgment on the findings, and on the 4th of May the defendant gave notice of motion to set aside the findings and remit the action to the official referee on various grounds.

The motions came on together.

Pollard (*F. Randolph*, with him) moved for judgment and raised a preliminary objection to the defendant's motion. He contended that by s. 58 of the Judicature Act, 1873, the findings of a referee, being equivalent to the verdict of a jury, could only be set aside in the same manner, that is by rule to show cause made within the time limited for impeaching the verdict of a jury. He cited *Sullivan* v. *Rivington* (1), *Miller* v. *Pilling* (2), and *Cooke* v. *Newcastle and Gateshead Water Co.* (3)

Bompas, Q.C., and *Maidlow*, contrà, contended that s. 58 did not deal with the mode of setting aside the findings of a referee. In such a case a rule nisi is not expressly authorized by the rules, and the motion must, by Order LIII., rules 2 and 3, be on notice. Order XXXIX., rules 1 and 1A, are limited to trials at nisi prius in Westminster or London or in the country, and the times are fixed with relation to the assizes, so that it is clear that these

(1) 28 W. R. 372. (2) 9 Q. B. D. 736.
(3) 10 Q. B. D. 332.

rules do not apply to references: *London* v. *Roffey* (1), and *Davis* v. *Godbehere*. (2) Sect. 58 implies that the findings can be set aside, and the Court must have power to remit the case even if the rules are silent on the mode of doing so. But Order XXXVI., rule 34, supplies the authority if any is needed. They referred also to *Dunkirk Colliery Co.* v. *Lever* (3), and *Walker* v. *Bunkell*. (4)

Pollard, in reply. Order XXXVI., rule 34, is only applicable to cases in which a referee raises a question for the opinion of the Court. Possibly any objections of the defendant to the report may be raised on the motion for judgment, but the authorities show that they cannot be raised by notice of motion.

WATKIN WILLIAMS, J. We will deal with this preliminary question at once. This is a motion on behalf of the defendant, made on notice to the other side for an order to set aside the report of the official referee and to remit the case to him. To this a preliminary objection has been taken. The point is raised that the report of the official referee being by s. 58 of the Judicature Act equivalent to the verdict of a jury, the only way in which it can be impeached is by a rule calling on the other side to show cause why it should not be set aside, and that consequently this motion is wrong in form and out of time. On the question of form it is answered that it is obligatory on the defendant to move on notice, for by Order LIII., rules 1, 2, 3, that is the right course to pursue, unless there is some rule expressly authorizing an application for a rule nisi. We have therefore to inquire whether there is such a rule. We are referred to Order XXXIX., rule 1A, but reading that with rule 1 of the same order it is impossible to resist the conclusion that the framers of the rule intended to deal with cases of trial by a jury, or by a judge without a jury at nisi prius, and that these rules do not authorize an application for a retrial such as the present. It may be that the present is a casus omissus, but at any rate the wording of Order XXXIX., rule 1A, is not applicable to it.

We have been however referred to the case of *Sullivan* v.

(1) 3 Q. B. D. 6.
(2) 4 Ex. D. 215.
(3) 9 Ch. D. 20.
(4) 22 Ch. D. 722.

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Rivington (1) as conclusive on the matter, but when we come to look closely at that case we see that it is not an authority in the present. The application there was for a rule nisi, and unless the plaintiff was entitled to move for an order or rule nisi he was wrong for he had given no notice, while if he could move for a rule nisi the Court decided that he was out of time to do so, and so the case is not an authority that the mode of moving there was right as the matter was concluded by showing that if right it was out of time. The only remaining question here is whether the findings can be impeached at all, but this does not arise on this preliminary objection which deals only with the question of time. It is not necessary therefore to decide this point, though my opinion is that under Order XXXVI., rule 34, the case before us is covered.

CAVE, J. I am of the same opinion. The Judicature Act, 1873, provided a novel method of disposing of questions in an action, or of an action itself, by reference to an official referee. Sect. 58 enacts that the findings of such a referee shall (unless set aside by the Court), be equivalent to the verdict of a jury. It is on these words that the objection to the motion is founded. There is a certain amount of complication in the matter; but I have come to a clear opinion as to the way in which the rules should be construed and that the objection cannot prevail. It is said that the enactment that the findings shall be equivalent to the verdict of a jury impliedly introduces in the case of such findings the same mode of setting them aside as is in use in respect of the verdict of a jury. I see nothing in the language of the section to require that construction to be put upon it.

As a new method of trial is introduced, I should have expected to find some rules as to the mode of carrying out the trial and subsequent matters. Accordingly I find in Order XXXVI. rules beginning at rule 29 dealing with these matters. The important one for our present purpose is rule 34. It is obvious in the first place that a referee may have a difficulty as to the report he should make, and the rule first provides for this by enabling him before the conclusion of the trial before him or in

(1) 28 W. R. 372.

his report to submit any question for the decision of the Court, or state any facts specially. This provides for any difficulty the referee may feel; but, when that is disposed of, or when the report has been made, the Court may itself have a difficulty, and the rule accordingly enables the Court to require explanations or reasons from the referee. Now it seems to me that these explanations or reasons are as likely to be required when no preliminary questions are raised, or no facts stated to raise a question, as when that is the case. In such an event the rule authorises the Court to require any explanations or reasons from the referee, and to remit the cause or matter, or to decide the question referred on the evidence taken before the referee, either with or without any additional evidence as the Court may direct. It certainly seems to me that in this part of it, the rule is no longer dealing with the difficulties felt by the referee, but with those of the Court, and is providing a means of meeting them.

If that is the true construction, the Court is authorized in every case to remit for a new trial. How is this to be done? The party dissatisfied will naturally desire to move to set aside the findings, and Order LIII., rule 3, in the absence of any previous practice or express rule to the contrary, provides that such a motion must be made on notice. It is said there is a flaw in the rules, because no time is mentioned in which such a motion should be made as in the case of moving to set aside the verdict of a jury. It seems to me that different considerations apply to the two proceedings. Under the old practice unless the judge before whom a case was tried stayed the postea, there was, when a verdict was given, an end of the action, and the successful party might proceed to obtain the fruits of it. It is obvious that in such a case some time must be settled, after which the verdict should no longer be questioned. On the other hand the report of a referee has no effect so long as it remains a report. To produce any result it has to be adopted by the Court. If the party seeking to impeach the report does not do so before judgment has been given upon it, he is too late, because after judgment the report has no further value, and it is the judgment, and not the report that is relied on by the successful party, but so long as the report of the referee is unconfirmed by a judgment of

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the Court I think it may be impeached. This seems to me to be a natural mode of procedure and to be that provided for by the rules. Against this it is contended that "equivalent to the verdict of a jury" means not only having the same effect, but subject to the same procedure as to setting it aside. In the first place it appears to me that Order LIII., rules 2 and 3, are opposed to this. A motion ex parte for a rule to shew cause is only to be granted in an action, when such a course is expressly authorized by the rules. In the case of a reference it is nowhere expressly authorized by the rules, and the most that can be said is that the expression in the Act "equivalent to the verdict of a jury," applied to the finding of a referee, leads to an inference or implication that it is to be treated in the same manner in all respects, including the mode of setting it aside. This, however, is not consistent with Order LIII., rule 2, which only excepts express provisions of the rules, and does not deal with implications.

If this point fails and a rule nisi is not the proper motion to make, I cannot see how we can apply to such a case rules which deal with an application for a new trial. When we look at the wording of the rules that it is proposed to apply, we meet further difficulties, for Order XXXIX., deals with trial by a judge, or a judge with a jury, and throughout there is no allusion to a report of a referee. Now if Order XXXVI. rule 34 embraces the whole case of dealing with such reports, then I can understand that Order XXXIX. should make no mention of the matter. But if Order XXXVI., rule 34, is limited as suggested to questions raised by the referee, it is inexplicable to me that there should be no reference in Order XXXIX. to the ordinary case of a report on a reference coming before the Court. On the one side there seems to me to be a consistent system open to no objections, and on the other we are met by the difficulties pointed out, and I come to the conclusion that there is no authority for moving ex parte, but, on the contrary, that such a motion is forbidden and that the language of the rules which deal with new trials in cases before a judge or a judge and jury is not applicable. As to *Sullivan* v. *Rivington* (1), I quite agree with Williams, J. The

(1) 28 W. R. 372.

position of the applicant in that case was untenable, and made the judgment of the Court inevitable.

A. L. SMITH, J. I am of the same opinion. Mr. Pollard founds his contention entirely on the last words of s. 58, and argues from them that the findings of fact of the referee must be dealt with as if they had been findings of a jury. I think this is incorrect, and that all the section deals with is the binding effect of those findings. As to the way in which they are to be set aside, I think we have only to read Order XXXIX., rule 1, and rule 1A, to see that they have no application to such a case as the present. I quite agree the proper way to get relief is under Order XXXVI., rule 34. The second part of that rule appears to me to be perfectly general, and to be directed to any report which comes before the Court, and not merely to a question raised either during the progress of the case before the referee or by his report. I agree that *Sullivan* v. *Rivington* (1), is not an authority in the present case, and I wish to point out that in *Miller* v. *Pilling* (2) Brett, L.J. did not say anything as to what was the proper mode of moving to impeach the findings.

Objection overruled.

Solicitors for plaintiff: *Meynell & Pemberton.*
Solicitors for defendant: *Stones, Morris, & Stone.*

(1) 28 W. R. 372. (2) 9 Q. B. D. 736.

A. M.

1883
May 30.

GULLISCHEN *v.* STEWART BROTHERS.

Ship—Charterparty—Cesser Clause—Bill of Lading—Incorporation of Conditions of Charterparty in Bill of Lading.

A charterparty contained stipulations in the usual form for payment of freight and demurrage, and also a stipulation that "as this charterparty is entered into by the charterers for account of another party their liability ceases as soon as the cargo is on board, the vessel holding a lien upon the cargo for freight and demurrage." The charterers having placed the cargo on board at the port of loading, a bill of lading was signed whereby the goods were made deliverable to themselves at the port of discharge, "they paying freight and all other conditions as per charterparty." In an action by the shipowner against them, as consignees of the cargo, for demurrage in respect of delay at the port of discharge:—

Held, that the cesser clause in the charterparty must be rejected as inapplicable in reading the bill of lading, which incorporated all the conditions of the charterparty applicable to the reception of the goods at the port of discharge, and therefore that the plaintiff was entitled to maintain the action.

Affirmed on appeal WMSy 16. Ca

SPECIAL CASE.

The material facts stated in the case were as follows:—The action was brought to recover £56 for demurrage of the plaintiff's ship *Alette*. On the 13th of December, 1881, a charterparty was made between the plaintiff, through his agents, and the defendants, under which the *Alette* was to load from the defendants at Miramichi a cargo of deals and battens to be carried at a certain rate of freight to a safe port on the west coast of Great Britain. The charterparty contained the following clauses:—

"It is agreed that as this charterparty is entered into by the charterers for account of another party their responsibility ceases as soon as the cargo is on board, the vessel holding a lien upon the cargo for freight and demurrage. The usual custom of each port to be observed by each party in cases where not specially expressed"; and "seventeen days, Sundays and holidays excepted, are to be allowed the merchant (if the ship be not sooner despatched) for loading, and for discharging cargo fifteen like days. Lay days to commence when ship is ready in a proper loading and discharging berth respectively; demurrage at the rate of fourpence per register ton per day to be paid to the ship if longer detained."

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The defendants shipped on the *Alette* at Miramichi under the charterparty a cargo of wood goods in two lots, and two sets of bills of lading were signed in respect thereof by which the goods were made deliverable at the port of discharge on the River Mersey to the defendants or their assigns, "they paying freight and all other conditions as per charterparty."

Whilst the ship was on her voyage the defendants indorsed for value the first of the two bills of lading to a purchaser, and having sold a portion of the cargo comprised in the second bill of lading they indorsed on that bill of lading an order for delivery to the purchasers of that portion of the cargo; the defendants themselves being the owners and receivers of the remaining portion.

The ship arrived at Liverpool, and the discharge was commenced on the 11th of July, 1881, and was not completed until five days after the expiration of the fifteen lay days specified in the charterparty. The detention arose through no fault of the ship, but because the remainder of the cargo could not be delivered to the purchasers thereof until after the delivery to the defendants of their portion.

The claim was made against the defendants as consignees of the cargo.

The question for the opinion of the Court was whether upon the facts stated in the case the defendants were liable. If the Court found for the plaintiff judgment to be entered for him for 56*l.* and costs; if for the defendants, judgment to be entered for them with costs.

French, for the plaintiff. The plaintiff is entitled to demurrage under the charterparty. The bill of lading incorporates all the conditions of the charterparty having reference to the reception of the cargo at the port of discharge. The cesser clause only relieves the charterers as such from liability after the cargo is placed on board at the port of loading. The conditions with respect to freight and demurrage at the port of discharge are incorporated by the bill of lading, and bind the consignees of cargo notwithstanding that they were also the charterers. In reading the bill of lading the cesser clause may be rejected as inapplicable.

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Edwyn Jones, for the defendants. In the absence of express terms in the charterparty there is no implied contract by the charterer to discharge the ship of cargo in any given time. The only implied contract is to pay freight: *Evans* v. *Forster*. (1) The words in the bill of lading "paying freight and all other conditions as per charterparty" render the responsibility of the consignee of cargo co-extensive with that of the charterer: *Smith* v. *Sieveking* (2); *Wegener* v. *Smith* (3); *Porteous* v. *Watney*. (4) In the present case the cesser clause in the charterparty makes the charterers' liability cease when the goods are placed on board at the port of loading; the co-extensive liability of the consignees therefore ceased at the same time, and the shipowner's remedy was by lien for freight and demurrage. There is no allegation of unreasonable delay so as to give him a right to recover unliquidated damages. In *Gray* v. *Carr* (5) the bill of lading contained substantially the same words as those in question here, but the only point argued was whether the shipowner was entitled to his lien for demurrage, and it was not suggested that he could bring an action under the charterparty. In *French* v. *Gerber* (6) the cesser clause was held to exonerate the charterer from liability for all acts and defaults after the ship was loaded.

[He also referred to *Sanguinetti* v. *Pacific Steam Navigation Co.* (7)]

French, in reply. The decision in *French* v. *Gerber* (6) was that the cesser clause exonerated the defendants from liability for damages in respect of breaches of the contract in the charterparty in not giving any orders as to the port of discharge, and in not ordering the ship to a safe port, and the charterers were held absolved so far as the damages were covered by the shipowner's lien. That case therefore does not cover this where the claim is for demurrage under the terms of the charterparty, not for unliquidated damages. The cesser clause, if the contention for the defendants were sustained, would have the effect of preventing all the consignees of the cargo of a general ship from being liable for

(1) 1 B. & Ad. 118.
(2) 4 E. & B. 945; 5 E. & B. 589; 24 L. J. (Q.B.) 257.
(3) 15 C. B. 285; 24 L. J. (C.P.) 25.
(4) 3 Q. B. D. judgment of Thesiger, L.J., at p. 536, and of Brett, L.J., at pp. 541, 542.
(5) Law Rep. 6 Q. B. 522.
(6) 1 C. P. D. 737; 2 C. P. D. 247.
(7) 2 Q. B. D. 238.

freight under the charterparty. *Gray* v. *Carr* (1) differs from this case because the demurrage was claimed for delay at the port of loading; and *Smith* v. *Sieveking* (2) is in the plaintiff's favour. The shipowner claimed demurrage against the consignee of cargo for delay at the port of loading, and the decision was that the terms of the charterparty with reference to the state of things existing at the port of loading were not incorporated in the bill of lading.

POLLOCK, B. In this case the defendants are sued, as consignees of cargo, for demurrage. The action is brought, as appears from the pleadings, in respect of their liability under the bill of lading, and not as charterers. The claim is not for damages for unreasonable delay in unloading as in *Randall* v. *Lynch* (3), but for demurrage according to the terms of the charterparty. The ordinary liability of consignees is stated, in *Harman* v. *Gandolph* (4), thus: "The consignee by taking to the goods contracts with the owners of the vessel to perform the terms upon which they have undertaken to convey and deliver them. Those terms are expressed in the bill of lading." The bill of lading in the present case contained a reference to the charterparty in these terms, "paying freight and all other conditions as per charterparty." I am of opinion that the effect of that stipulation is to import into the bill of lading so much of the charterparty as is referable to the subject-matter of the discharge and receipt of cargo at the port of discharge. It is important in determining what portions of the charterparty are imported to bear in mind that the plaintiff's claim is solely for demurrage at the port of discharge. The cesser clause in the charterparty, which is in the common form, stipulates that the responsibility of the charterers shall cease as soon as the cargo is on board, the vessel holding a lien for freight and demurrage. It is perfectly intelligible and reasonable that that stipulation should have full effect to exempt the charterers from liability for demurrage after the cargo is placed on board at the port of loading; but the effect of it cannot surely be to displace the right of the shipowner to sue the

(1) Law Rep. 6 Q. B. 522. 24 L. J. (Q.B.) 257.
(2) 4 E. & B. 945; 5 E. & B. 589; (3) 2 Camp. 352.
(4) Holt's Rep. 38.

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consignee of cargo for freight and demurrage at the port of discharge. It is contended that the whole of the charterparty must be imported into the bill of lading, including the cesser clause which relieves the charterers of all liability after the cargo has been placed on board. It would in my view be unreasonable that into whatsoever hands the bills of lading might come, the holders should be wholly irresponsible for freight and demurrage under the charterparty. If my view be correct, I do not think the fact that the defendants were charterers as well as consignees of cargo makes any difference. The consignees because they are charterers are not the less liable in respect of the stipulations of the contract which they have made by the bill of lading. It is consistent that, having acted as agents in chartering the ship, they should contract to be relieved from liability for demurrage at the port of loading, and that as consignees of cargo they should contract to be responsible for freight and demurrage under the charterparty at the port of discharge. I think the judgments of Lords Justices Brett and Cotton in *Porteous* v. *Watney* (1) afford clear authority for saying that under the provision in bills of lading "paying freight and all other conditions as per charterparty" a condition of the charterparty which has become inapplicable may be rejected in reading the bill of lading. I think the cesser clause here may be rejected, and I am therefore of opinion that our judgment should be for the plaintiff.

LOPES, J. I am of the same opinion. It is important to remember that the claim in this case is for demurrage in respect of delay in unloading the ship at the port of discharge, and that the claim is made against the defendants not as charterers but as consignees of cargo. It is obvious, looking at the words in the bill of lading, "paying freight and all other conditions as per charterparty," that the consignee's contract must be ascertained by reference to the charterparty as well as the bill of lading. But the judgments of Brett and Cotton, L.JJ., in *Porteous* v. *Watney* (1) are clear to shew that any portion of the charterparty which is wholly inapplicable to the state of things existing when the bill of lading has to be construed must be rejected. I think

(1) 3 Q. B. D. 534.

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that view is founded on sense and reason. Here I think it is clear that those conditions of the charterparty which have reference to demurrage at the port of discharge must be incorporated in the bill of lading; it is equally clear to my mind that the cesser clause cannot be incorporated. The terms of that clause shew that it was only intended to relate to the state of things existing at the time the cargo was put on board. It clearly does not relate to the state of things existing at the port of discharge. I am of opinion, therefore, that it does not apply, and that the plaintiff is entitled to recover.

Judgment for the plaintiff.

Solicitors for plaintiff: *Venn & Co., for Collins, Robinson, & Co., Liverpool.*

Solicitors for defendants: *Kearsey, Son, & Hawes.*

W. A.

Ex parte SAUNDERS AND ANOTHER.

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June 9.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 94–96 —*Nuisance, Power of Justices to order Specific Works for Abatement of.*

A water-closet in the centre of a house being a nuisance, the sanitary authority gave notice to the owner of the house under the 94th section of the Public Health Act, 1875, to abate the nuisance, and for that purpose to remove the said closet from the centre of the house and place the same near an outer wall where there might be efficient ventilation, and to fix the soil-pipe outside the walls. The owner making default in so doing, justices thereupon, under s. 96, ordered him to do the things above specified:—

Held, that they had jurisdiction under the 96th section to make the order.

Ex parte Whitchurch (6 Q. B. D. 545) distinguished.

APPLICATION for a certiorari to bring up an order of justices made under the following circumstances. It appeared that the urban sanitary authority of the borough of Taunton had under the 94th section of the Public Health Act, 1875, served a notice upon the applicants, who were the owners of certain premises, requiring them within a certain time specified to abate a nuisance arising from a defective closet and drains on the said premises. The notice, the formal parts of which followed the form given by the 4th schedule to the Public Health Act, 1875 (Form A), directed the owners for that purpose to remove the closet from the centre of the house and place the same near an outer wall

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where there might be thorough and efficient ventilation. The notice proceeded to specify that the soil-pipe was to be fixed outside the walls and a pipe of similar diameter carried up above the eaves and capped by a ventilating cowl; the drains were to be also thoroughly examined, and if necessary relaid with stoneware pipes, and the joints made with neat cement covered with clay; the flushing arrangements were to be also re-arranged and a waste-water preventer was to be placed where necessary.

The applicants, though they complied with some of the requisitions of the notice, did not comply with the terms thereof so far as it directed the removal of the closet from the centre of the house, the placing of the same near an outer wall, and the fixing of the soil-pipe outside the walls. A complaint was thereupon laid before justices under s. 95 of the Public Health Act, 1875, by the urban sanitary authority against the applicants, and the justices being satisfied that the said nuisance had existed and, although the said nuisance was abated, it was likely to recur, made an order under s. 96 of the Public Health Act that the applicants should within fourteen days remove the said water-closet, soil-pipe, and drains from the centre of the said house and place the same near an outer wall of the same where there should be thorough and efficient ventilation, fix the soil-pipe outside the walls, carry up a pipe of similar diameter above the eaves and cap it with a ventilating cowl, thoroughly examine the drains and relay the same with stoneware pipes and make the joints with neat cement covered with clay, rearrange the flushing arrangements, and make a waste-water preventer to the said closet apparatus.

A rule nisi had been obtained for a certiorari on the ground that the justices had no power to prescribe in order to the abatement of the nuisance the doing of any particular work, or the erection, reconstruction, or substitution of any particular kind of closet pipes or drains or other appliance.

Charles, Q.C., and *Herbert Reed*, shewed cause against the rule. The 96th section of the Public Health Act, 1875, clearly authorizes the justices to make such an order as they have made. It is submitted that the section makes the justices the judges of the question what works are necessary. The form of order given in

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the 4th schedule to the Act (Form C) clearly contemplates the ordering of such specific works as the justices may think necessary for the prevention of the nuisance. The applicants will rely on *Ex parte Whitchurch* (1). That case is distinguishable. There the justices ordered the abandonment of an existing privy and the erection of a pail closet. Here they have ordered not the construction of a wholly new thing, but the removal of an existing closet to a different situation.

Rose, in support of the rule. The case of *Ex parte Whitchurch* (1) is indistinguishable from the present. It is a clear authority to shew that the justices have only power to order generally the construction of such works as may be necessary for the purpose of abating the nuisance, and cannot specify the works to be constructed. The party upon whom the order is made must at his peril execute such works as may have the effect of abating the nuisance, but he is left to select the particular works. If it were not so, practically speaking he would be ordered to do just what works the surveyor to the local authority might conceive to be best, and they might turn out to be ineffectual for the purpose, and then he might be again proceeded against and made to do other works.

[He also cited *Hargreaves* v. *Taylor*. (2)]

CAVE, J. I think this rule should be discharged. By the 94th section of the Public Health Act the local authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default or sufferance the nuisance arises or continues, or, if such person cannot be found, on the owner or occupier of the premises on which the nuisance arises, requiring him to abate the same within a time to be specified in the notice, and to execute such works and do such things as may be necessary for that purpose. By s. 95, if the person on whom such a notice has been served makes default in complying with the requisitions of the notice within the time specified, or if the nuisance, although abated, is in the opinion of the local authority likely to recur on the same premises, the local authority shall complain to a justice, and the justice shall summon such person

(1) 6 Q. B. D. 545.

(2) 3 B. & S. 613; 32 L. J. (M.C.) 111.

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to appear before a court of summary jurisdiction. By s. 96, the court, if satisfied that the alleged nuisance exists, or that although abated it is likely to recur, "shall make an order on such person requiring him to comply with all or any of the requisitions of the notice, or otherwise to abate the nuisance within a time specified in the order, and to do any works necessary for that purpose." Who upon the true construction of these provisions is to decide what works are necessary for the purpose of abating the nuisance? It seems to me obvious that the justices are intended to decide. Here the justices, being satisfied that the nuisance was likely to recur, and that these works were necessary for the prevention of such recurrence, have ordered them to be done. I should have thought that upon the terms of the section it was as clear as could be that they had jurisdiction to make the order. The counsel for the applicants, however, relies on the case of *Ex parte Whitchurch* (1) as an authority to the contrary. It does not seem necessary to say more with regard to that case than that it is distinguishable from the present. In that case the owner of the premises had a privy of the ordinary kind, and the order did not direct the execution of such works as might be necessary for preventing the privy from being a nuisance, but directed the owner to put up a particular kind of closet. Whether that case is right or wrong, it does not appear to me to be any authority to shew that this order is bad.

A. L. SMITH, J. I am of the same opinion. It seems to me that this case would not have been arguable but for the decision in *Ex parte Whitchurch.* (1) But on consideration I think that decision is distinguishable. There an order was made to erect a particular kind of closet. Here the order is not for the erection of a particular kind of closet where no closet existed before, but there being already a closet the order is for its removal to a place where it will not be a nuisance. It seems to me that this order is clearly within the terms of the Act.

Rule discharged.

Solicitor for applicants: *W. A. Boyle, for Samuel Chapman.*

Solicitors for urban sanitary authority: *Reed, Lovell, & Reed, for Reed & Cook.*

(1) 6 Q. B. D. 545.

E. L.

SMITH, APPELLANT; THE MAYOR, ALDERMEN, AND BURGESSES OF BIRMINGHAM, RESPONDENTS. 1883 *June* 6.

Water-rate—"Annual Rent," how to be estimated—"Voids"—Owner compounding for Rates—Repairs and Insurance.

It was provided by a Water Act that the charge to be made for the supply of water for domestic use should be at a rate varying according to the "annual rent" of the premises supplied.

The appellant was the owner of certain houses supplied with water by the respondents under the Act. The houses were let at weekly rents, the appellant paying all rates charged thereon, and also for all repairs and insurances in respect thereof. He was allowed, as an owner, under 32 & 33 Vict. c. 41, s. 4 (the Poor-rate Assessment and Collection Act, 1869), a deduction of 30 per cent. from the full amount of the poor rate which an occupier if rated would have paid.

The respondents charged the appellant with water-rates calculated on the following basis: they multiplied the weekly rents by fifty-two and deducted from the amount so arrived at the actual sums paid by the appellant for rates, and then charged the water-rates upon the balance:—

Held, that, in order to arrive at the "annual rent" upon which the water-rate was to be computed, an allowance should be made in respect of "voids," i.e., houses lying vacant from time to time; and that the actual amount of the poor-rates and other rates paid by the appellant was rightly deducted, but that the appellant was not entitled to deduct the full amount of the rates which an occupier if rated would have paid; nor the amount which he paid for repairs and insurances.

Meaning of the terms "annual rent" and "annual value" discussed.

Dobbs v. Sheffield Waterworks Co. (10 Q. B. D. 337) followed.

CASE stated by the stipendiary magistrate for the borough of Birmingham.

A summons had been taken out by the appellant against the respondents under ss. 68 and 85 of the Waterworks Clauses Act, 1847, in order that the magistrate might determine a dispute which had arisen as to the "annual rent," within the meaning of s. 83 of the Birmingham Waterworks Act, 1855 (which incorporated the Waterworks Clauses Act, 1847), and the Birmingham Corporation Water Act, 1875, of certain houses the property of the appellant which had been supplied with water by the respondents. The facts stated by the magistrate sufficiently appear from the judgment.

May 8. *Hugo Young*, for the appellant. The question is, what

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is the meaning of the term "annual rent" in the Birmingham Waterworks Act, 1855, s. 83, which term is admitted by the respondents to be equivalent to the term "annual value" in the Waterworks Clauses Act, 1847 (10 Vict. c. 17), s. 68. It is contended that the meaning of the term as used in this Act is "rateable value." It is clear, however, that upon any construction the corporation were wrong in taking the actual weekly rents multiplied by fifty-two as the basis, without taking into consideration the vacancies that from time to time occur in the case of weekly tenancies upon the changes of tenants: *Sheffield Waterworks Co.* v. *Bennett* (1). It is further contended that the appellant was clearly entitled to have deducted, in estimating the rent, the full amount of the rates which an occupier would have paid, and not merely the amount of the composition paid by him as owner. The difference between the two amounts is the allowance made to the owner for the trouble and cost of collection and the risk which he incurs.

[HAWKINS, J. He gets more rent, or his rent is subject to a smaller charge, because he takes the trouble and risk upon himself.]

It is submitted that the difference cannot be looked on as rent: *Reg.* v. *Bilston.* (2) The appellant was entitled to a deduction for repairs, insurances, and other expenses necessary to keep the houses in a state to command the rent. The result of a comparison of the previous statutes with regard to supply of water and water-rates in the borough of Birmingham, and also of the provisions of the Public Health Act, 1875, with regard to supply of water by an urban authority, leads to the conclusion that by the terms "annual rent" and "annual value" used in this connection the Legislature meant "net annual value" or "rateable value." (3)

Alfred Young (*Webster, Q.C.*, with him), for the respondents. The question is as to the meaning of "annual rent" in the Birmingham Waterworks Act, 1855, and "annual value" in the

(1) Law Rep. 7 Ex. 409.

(2) 35 L. J. (M.C.) 97.

(3) The learned counsel's argument on this point, and the sections and cases to which he referred, are so fully set forth in the judgment that it has been thought unnecessary to give them in detail here.

Waterworks Clauses Act, 1847. The other Acts that have been referred to have no bearing on this question. It is contended that "annual rent" is equivalent to gross estimated rental, or, if not, that at any rate the corporation have assessed the water-rate in accordance with the principles laid down in *Dobbs* v. *Grand Junction Waterworks Co.* (1). The gross estimated rental represents what would be the annual rent if there was one. The "rateable value" does not represent the annual rent properly so called. It is the rent after making certain deductions expressly provided for by the statutes relating to the poor-rate. There are no provisions for any such deductions in the Birmingham Waterworks Act, and the words "annual rent" must therefore receive their natural construction. The reasoning of the judges in *Dobbs* v. *Grand Junction Waterworks Co.* (1) is exactly applicable to the present case. In ascertaining the rent, clearly the appellant is only entitled to have deducted what he actually pays for rates.

Hugo Young, in reply.

Cur. adv. vult.

June 6. The judgment of the Court (Denman and Hawkins, JJ.), was delivered by

DENMAN, J. This was a case stated by the stipendiary magistrate for Birmingham in order that the Court might decide the proper mode of assessing the amounts payable by the appellant for water-rates.

The corporation of Birmingham, the respondents, had vested in them by 38 & 39 Vict. c. clxxxviii. (the Birmingham Corporation Water Act, 1875), all the powers and authorities of the Birmingham Waterworks Company. The power and authority of the Birmingham Waterworks Company as to the supply and charging for water is to be found in s. 83 of 18 Vict. c. xxxiv. (the Birmingham Waterworks Act, 1855).

By that section it is provided as follows: "The company shall at the request of the owner or occupier of any house or part of a house in any street in which any pipe of the company is or shall be laid, or on the application of any person who under the provisions of this Act is entitled to demand a supply of water for

(1) 10 Q. B. D. 337.

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domestic purposes, furnish to such owner or occupier or other person a sufficient supply of water for domestic use at rates not exceeding the yearly rates hereinafter specified (that is to say): Where *the annual rent* of the house, or part of the house or premises supplied shall not exceed 5*l.* the yearly rate of 6*s.*" Then follows a scale increasing with the increase in the "annual rent," and ending as follows: "Where *such annual rent* shall exceed fifty pounds, at a rate not exceeding 6*l.* per cent. on the amount of *such annual rent.*"

The property in respect of which our opinion is desired consists of small houses let at weekly sums on the terms that the appellant, who is the owner, pays all rates, taxes, and assessments of all kinds charged upon or in respect of the premises, including the charge for water, and pays for all repairs and insurances and other matters relating to the premises. He is rated to the poor-rate instead of the occupiers under 32 & 33 Vict. c. 41, s. 4, and is allowed the deduction of 30 per cent. therein provided for; also to the borough and street rates under the Birmingham Improvement Act, 1851, being allowed the deductions therein provided for (s. 135).

The appellant has been voluntarily rated instead of the occupiers to the water-rates. The question for our determination is what is the true meaning of the expression "the annual rent" in s. 83 of the Act of 1855. The corporation charged the appellant on the following basis. They multiplied the weekly rents by fifty-two, and deducted from the amounts so arrived at the actual sums paid by the appellant for poor and borough and street and water-rates, and then charged the water-rates in question upon the difference. The appellant claimed further deductions for insurance, repairs, and voids. (1) As to the last we understand the case to mean that the stipendiary magistrate was willing to accede to that contention, but that being in favour of the respondents on all other points our opinion is desired as to the whole matter.

The appellant further contended that the Public Health Act, 1875 (which was passed nine days after the Birmingham Corporation Waterworks Act, 1875), has superseded any provisions as to

(1) The tenancies being weekly there were from time to time vacant houses caused by changes of tenants.

the mode of charging the water-rates which are inconsistent with its provisions, and made the "net annual value" the amount upon which the water-rate is to be assessed. He also contended that he was entitled by way of deduction, not only to the amounts actually paid by him under 32 & 33 Vict. c. 41, s. 4, and the Birmingham Improvement Act, 1851, s. 135, but the full rates which would be payable if the occupiers paid the rates.

If this case were unaffected by the authority of decided cases it might seem to admit of a short decision in favour of the respondents. Turning as it does upon the meaning of the words "annual rent" it is possible to arrive at the conclusion at which the stipendiary magistrate has arrived by an easy process. Having ascertained the actual amounts of the weekly rents he has multiplied these by the number of weeks in the year, intimating, however, that he is prepared to allow a proper deduction for voids and for the actual amounts paid by the appellant for rates. The balance so arrived at he holds, or is prepared to hold, to be the proper sum representing the "annual rent" within the meaning of the 83rd section, upon which it is admitted that the question mainly turns.

In the case of *Sheffield Waterworks Co.* v. *Bennett* (1) an action was brought by the plaintiffs for water-rates for water supplied to houses of which the defendant was owner. The words of the clause regulating the amount to be paid for water required to be supplied were these, "at the following rate per annum, that is to say where the *rent* of such dwelling-house or part of a dwelling-house shall not amount to 7*l.* per annum at a rate not exceeding 6*l.* per cent. per annum *on such rent*," and so on.

The dispute in that case was in substance whether the plaintiffs were entitled to charge a sum for water calculated at so much per cent. on the rents actually received as the plaintiffs contended, or whether the true meaning of the word "rent" in the clause was annual value, that is to say the annual value of the property ascertained by deducting from the proper rent those outgoings which the landlord pays, viz. poor-rates, water-rates, and district rates. The words there in question, "where the *rent* shall not amount to *l. per annum*," seem to us to be undistinguishable for any purpose from the words of s. 83 of the Act here in

(1) Law Rep. 7 Ex. 409.

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question, "where the *annual rent* shall not exceed *l.*"; and the words in that case, "at a rate not exceeding *l.* per cent. per annum *on such rent*," are practically the same as the words of s. 83, "at a rate not exceeding *l.* per centum on the amount of such *annual rent*." So far then as concerns the allowance to the landlord of the amount of the rates paid by him, and so far as concerns the calculation of the annual value not being tied down to the actual *rents* received we think that the case of *Sheffield Waterworks Co.* v. *Bennett* (1) is in the appellant's favour, and shews that the *proper* rental not the actual rental is the test, and that the proper rental is the amount which the landlord would put into his pocket after deducting the rates paid by him. But the appellant contends that in deducting the rates paid by him he is entitled to a deduction of the *full* amount to which such rates would be payable if paid by the tenants and not by himself, i.e., to 30 per cent. more than the actual amount paid by him in respect of such rates.

We cannot accede to this contention.

The composition into which the appellant enters, where he is voluntarily rated, and the percentage allowed by the statutes to the landlord where he pays the rates under the provisions of the statutes, are calculated roughly with the view of compensating the landlord for the trouble he incurs and the losses he may sustain by payment of charges primâ facie payable by the occupiers of his property, and we do not think that the legislature intended, nor has it anywhere provided, that, in estimating charges which he has to pay, he can deduct in respect of such outgoings from the annual value upon which he is to be rated more than the sums which he in fact pays. We think that the stipendiary magistrate was right in disallowing this deduction.

The case of *Reg.* v. *Bilston* (2), which was cited to the contrary, turned wholly on the words of the Parochial Assessment Act, which authorized a deduction of the usual tenants' rates, and held that where the landlord compounded he was still entitled to deduct the usual amount paid by tenants, where the tenants pay rates, in order to arrive at the nett value of the premises within the meaning of 6 & 7 Wm. 4, c. 96, s. 1. But inasmuch as, for

(1) Law Rep. 7 Ex. 409. (2) 35 L. J. (M.C.) 97.

the reasons to be given presently, we do not think that that Act applies, we are left to decide the meaning of "annual rent" in s. 83 without any assistance from *Reg.* v. *Bilston.* (1)

The appellant also contended that he was entitled to an allowance for "voids," i.e., as we understand the word, that inasmuch as the property is let at weekly rents, the proper "annual rent" was not the weekly rent multiplied by fifty-two, but what, after making a fair calculation of the loss to the landlord by the want of tenants, incident to property of this kind let to weekly tenants, would be in practice the total value received in the year for the property in question. Here we think his contention is right, and we understand that the stipendiary magistrate is prepared to hold accordingly, and to vary his decision in that respect.

But, beyond these contentions, the appellant has raised a question of greater importance, and which does not seem to have been expressly decided by the case of the *Sheffield Waterworks Co.* v. *Bennett* (2), or any other case. His contention is that, in addition to the deductions for rates and voids, he is also entitled to a further deduction for the annual average cost of repairs, insurance, and other expenses necessary to maintain the premises in a state to command the present weekly payments of the tenants, in other words, to have the water-rate assessed upon the rateable value of the premises after making all the allowances required by 6 & 7 Wm. 4, c. 96, s. 1, in the case of poor-rates. Reverting to the words of the section with which we have to deal, they are, "where the annual rent of the house or part of a house supplied shall not exceed . . . . the yearly rate of . . . . ," and "where such *annual rent* shall exceed 50*l.* at a rate not exceeding 6*l.* per cent. on the amount of such *annual rent.*" The arguments of the appellant may be stated shortly as follows: The question, being reduced to whether the words "annual rent" in s. 83 of the Act of 1855 meant "nett annual value" or "gross estimated rental," is to be decided by reference to all the statutes relating to the water-rates to be charged either by the corporation or by the company whose rights the corporation has purchased; and, though some of these Acts are not now in force, they may be looked at for the purpose of putting a construction upon the words

(1) 35 L. J. (M.C.) 97. (2) Law Rep. 7 Ex. 409.

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"annual rent," in s. 83. The decisions also prior to the Parochial Assessment Act may be referred to, and throw light upon the subject.

By a local and personal Act of 7 Geo. 4, the Birmingham Waterworks Company were incorporated for the purpose of supplying Birmingham with water. This Act was repealed by the Birmingham Waterworks Act, 1855 (except so far as the incorporation of the company was concerned). In the meantime, by the Birmingham Improvement Act, 1851, the council were, by s. 109, empowered to provide water for the purposes of that Act *and for private use*, and for that purpose to contract with the Birmingham Waterworks Company for a supply of water, and after twelve months' notice to purchase the whole works of the company, in which case all the powers of the company, inter alia, in regard to receiving and recovering of rents or rates for water, were from the date of the purchase to belong to the council. By s. 124 of that Act the council were empowered as long as any building should be supplied with water by the council for domestic use, to make a special rate called the "water-rate," upon the occupier. And the rate so made shall be assessed upon the *annual value* of the building ascertained in manner prescribed by clauses 175 and 176 of the "Towns Improvement Clauses Act, 1847." Turning to those clauses, it is provided by clause 175, that the *annual value* of all property rateable under that Act is to be "ascertained according to the next preceding assessment for the relief of the poor," but clause 176 provides that if the poor-rate be, in the judgment of the commissioners, an unfair criterion, they may cause a valuation to be made, "and in every such valuation the property rateable shall be *computed* at its *nett annual value* as defined by 6 & 7 Wm. 4, c. 96, or any other Act for the the time being in force for regulating parochial assessment." Clause 130 of the Birmingham Improvement Act, 1851, further provided that a new valuation should be made according to s. 176 of the "Towns Improvement Clauses Act, 1847," within eighteen months from the 1st of January, 1852.

No purchase of the waterworks by the corporation having been made under the powers of the Act of 1851, it was contended by Mr. Webster that that Act could have nothing to do with the

argument, but it was relied on by Mr. Hugo Young, for the appellant, as shewing that the legislature throughout, in dealing with the rates to be charged for water, when it uses the expression "annual value," contemplates "nett annual value" and not gross estimated rental. Other Acts were referred to for the same purpose, especially 38 & 39 Vict. c. 55 (the Public Health Act, 1875), which by s. 56 provides that "where a local authority supply water to any premises they may charge a water-rate assessed on the nett annual value of the premises ascertained in the manner prescribed by this Act with respect to general district rates," which by s. 211, is "on the full nett annual value" ascertained by the valuation list, if there be one, if not by the last poor-rate. The Union Assessment Act, 25 & 26 Vict. c. 103, was also quoted, as shewing that the legislature habitually uses the words "annual value," "nett annual value," and "rateable value," when dealing with questions of rating, as convertible terms. The case of *R.* v. *Tomlinson* (1) was also relied on by Mr. Hugo Young, for the appellant; but it certainly does not assist his argument, for Bayley, J., there says (2): "Annual rent is *not* annual profit or value," and the expression "*nett yearly rent*," used in that case is held to be equivalent to "the rent paid by the tenant after deducting taxes and charges of collection," and *not* "the clear annual rent after every deduction, including therefore the part to be set aside for repairs and reproduction of the subject of the rate" (3). He also relied on *Baker* v. *Marsh* (4), in which it was held that a town councillor was not "rated to the relief of the poor upon the *annual value* of not less than 15*l.*" where his *rateable value* was only 11*l.* 15*s.* But this case appears to us to have turned wholly upon the construction of the clause relating to the qualification in question and not to throw any light upon the meaning of "annual rent" in the clause now in question. In paragraph 9 of the case it is stated that the appellant contends and the corporation admit that the words "annual rent" in s. 83 of the Birmingham Waterworks Act, 1855, are equivalent to the words "annual value" in the Waterworks Clauses Act, 1847, s. 68; but we do not see that this admission assists us in deciding

(1) 9 B. & C. 163.
(2) 9 B. & C. at p. 167.
(3) 9 B. & C. at p. 166.
(4) 4 E. & B. 144.

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the meaning of either term, for the Waterworks Clauses Act, 1847, contains no definition or explanation of the words "annual value," but merely provides that the water-rates "shall be payable according to the *annual value* of the tenement supplied with water, and if any dispute arise as to such value the same shall be determined by two justices."

The respondents' counsel, Mr. Alfred Young, contended that no assistance was to be derived from the other Acts referred to by the appellant's counsel, and that the question was to be decided by reference only to the words of s. 83 of the Act of 1855, assisted by the construction put by the Court of Appeal upon the words "annual value" in the case of *Dobbs* v. *Grand Junction Waterworks Co.* (1)

He contended that the Act of 1851 never having been acted upon by the corporation (who had purchased the waterworks and obtained their powers solely under the Acts of 1875 and 1855) had no application to the case, and consequently that clauses 175 and 176 of the Towns Improvement Clauses Act had no application; or if they applied, that the words in s. 176, "property rateable shall be *computed at* its net annual value as defined by 6 & 7 Wm. 4, c. 96," only required such allowances to be made as would be required in order to get at the letting value of the house, in other words, at the "gross estimated rental" upon which the *rateable* value is afterwards to be *computed.*

Great reliance was placed by the respondents' counsel on the decision of the Court of Appeal in *Dobbs* v. *Grand Junction Waterworks Co.* (1) There the question was as to the meaning of the following words, "according to the *actual* amount of the rent where the same can be ascertained, and where the same cannot be ascertained according to the *actual amount or annual value upon which the assessment to the poor's-rate is computed.*"

The Court held that these words did not mean the *rateable* value as appearing in the rate, but the "gross estimated rental;" but the decision turned to a great extent upon the ground that the words "upon which the assessment is *computed*" shewed that the amount of the assessment itself could not be intended, and upon the fact that, at the time of the passing of the Act, the

(1) 10 Q. B. D. 337.

6 & 7 Wm. 4, c. 96, had not come into existence, and upon the absence of the word "rateable" and other similar considerations.

It did, however, contain many observations applicable to the present case, and to all cases in which the question arises, what is the value in respect of which a water-rate is to be calculated, and which seem to us to throw light upon the true meaning to be assigned to such words as "annual rent" in connection with the calculation of the amount to be paid for water supplied. For instance, Lord Coleridge, C.J., in discussing the words "actual amount or annual value upon which the assessment to the poor-rate is computed," says that they mean "the full amount at which the house to be rated would before the 6 & 7 Wm. 4, c. 96, have been *valued* by the persons who were to rate it, that amount not being subject to be afterwards reduced by those various heads of allowance with which we are all familiar, and which were to be made" (and as he afterwards observes "which we know historically were made before 6 & 7 Wm. 4, c. 96,") "by the overseers before the actual *assessment* upon any individual was arrived at." Baggallay, L.J. (1), says: "Annual value" "is not the annual value at which the house is assessed to the poor's-rate, but the annual value upon which the assessment to the poor's-rate is computed." Lindley, L.J., in his judgment (2) lays stress upon the omission of the words "nett" or "rateable," and concludes that the meaning of the words "annual value" is "whether the house is let or not let, what it would let for."

Having regard to these expressions as to the true meaning of the words "annual value," and to the words "annual rent," in s. 83 of the Act of 1855; and to the construction put upon the very similar words in *Sheffield Waterworks Co.* v. *Bennett* (3), we think it would be running counter to the cases cited, and laying down a rule inconsistent with them, if we were to hold that the words "annual rent" are equivalent to "rateable value ascertained in the manner provided by 6 & 7 Wm. 4, c. 96." It would have been so very easy for the legislature to use language shewing such intention if any such had existed, that we cannot help

(1) 10 Q. B. D. 352. (2) 10 Q. B. D. 353.
(3) Law Rep. 7 Ex. 409.

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thinking that the absence of any such language is a strong reason for holding that the words used have no such meaning.

The argument derived from other statutes containing very different words seems to us on the whole to tell against such an intention. Nor is there any reason why the one mode of arriving at the amount on which the payment for water should be assessed should be preferred to the other. The object of the legislature apparently is that houses or parts of houses supplied with water should pay water-rates calculated with reference to the class of the house, or to the value of the part of a house which is supplied; but this object will not be attained better by adopting the rateable value than by adopting the gross estimated rental as the value upon which the amount is to be assessed—either will suffice for the purposes of calculation, and the legislature may equally well be supposed to have adopted either. Looking at the words of s. 83, and putting the best construction we can upon the words "annual rent," we have come to the conclusion that in the main the stipendiary magistrate has taken the right view; and that, when he has calculated the allowance to be made for voids, as above explained, he will do right in allowing the rate to stand, with the necessary alteration occasioned by that allowance.

Judgment accordingly.

Solicitors for appellant: *Cottrell & Son.*

Solicitors for respondents: *Sharpe, Parkers, & Co., for the Town Clerk of Birmingham.*

E. L.

TAYLOR, APPELLANT; SMETTEN, RESPONDENT. 1883 *May* 10.

Lottery—Sale of Packets of Tea containing Coupons for Prizes—42 Geo. 3, c. 119, s. 2.

By 42 Geo. 3, c. 119, s. 2, it is made an offence to keep any office or place to exercise any lottery not authorized by parliament.

The appellant erected a tent, in which he sold packets, each containing a pound of tea, at 2*s.* 6*d.* a packet. In each packet was a coupon entitling the purchaser to a prize, and this was publicly stated by the appellant before the sale, but the purchasers did not know until after the sale what prizes they were entitled to, and the prizes varied in character and value. The tea was good and worth the money paid for it:—

Held, that what the appellant did constituted a lottery within the meaning of the statute.

CASE stated by justices under 20 & 21 Vict. c. 43 and 42 & 43 Vict. c. 49.

At a Court of summary jurisdiction in the borough of Darlington, on an information against the appellant under 42 Geo. 3, c. 119, s. 2 (1), for that he unlawfully did publicly keep in a tent

(1) 42 Geo. 3, c. 119, s. 2: "No person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep open, show, or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any game or lottery called a little goe, or any other lottery whatsoever not authorized by parliament, or shall knowingly suffer to be exercised, kept open, shown, or exposed to be played, drawn or thrown at or in, either by dice, lots, cards, balls, or by numbers or figures, or by any other way, contrivance, or device whatsoever, any such game or lottery in his or her house, room, or place, upon pain of forfeiting for every such offence the sum of five hundred pounds, to be recovered in the Court of Exchequer at the suit of His Majesty's attorney-general, and to be to the use of His Majesty, his heirs and successors; and every person so offending shall be deemed a rogue and vagabond within the true intent and meaning of an Act passed in the seventeenth year of the reign of his late Majesty king George the Second, intituled 'An Act to amend and make more effectual the laws relating to rogues, vagabonds, and other idle and disorderly persons, and to houses of correction,' and shall be punishable as such rogue and vagabond accordingly."

By 5 Geo. 4, c. 83, s. 1, all provisions theretofore made relative to rogues and vagabonds were repealed, but s. 21 provides "that wherever by any Act or Acts of Parliament now in force, it is directed that any person shall be punished .... as a rogue and vagabond .... for any offence specified in such Act or Acts, and not hereinbefore provided for by this Act, in every such case, whether such person

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a lottery to be drawn by lots and by coupons by a certain contrivance, to wit, the distributing of a quantity of parcels of tea with coupons in certain of such parcels, being a lottery not authorized by Parliament, to wit, a lottery for clocks and other articles, the justices convicted the appellant, but stated a case for the opinion of the Court.

The following are the material paragraphs of the special case:

4. Upon the hearing of the information it was proved on the part of the respondent, and found as a fact, that the appellant was an auctioneer at Grimsby, who travelled about from town to town with two caravans, and erected tents and sold articles of various descriptions. That a tent had been erected by him on a vacant space of land which he rented in the borough, and on every Saturday night he sold one pound packets of tea at 2*s.* 6*d.* per pound, in each of which it was stated at the time of the sale that there was a coupon entitling the purchaser to some prize. After selling the tea it was stated that on producing the coupons the purchasers would obtain their prizes on applying at the tent on the following Monday morning.

5. It was further proved on behalf of the respondent that on the 8th of July a person named Fowler went to the appellant's tent whilst one of these sales was going on, and there purchased a pound of tea, which contained a coupon entitling him to a nickel silver brooch. He stated that the demand for the tea was so great that 500 one pound packets were sold in three and a half minutes, and that it was stated by the appellant's men that each of these packets contained a coupon entitling the purchaser to a prize.

6. It was further proved on behalf of the respondent that a woman named Kettlewell had purchased at the appellant's tent on the 8th of July, 1882, a pound of tea, for which she paid 2*s.* 6*d.*, and which contained a coupon for glass vases, and on applying at the tent on the following Monday she obtained the prize from one of the appellant's men.

7. Two other witnesses were called on behalf of the respondent,

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shall or shall not have committed any offence against this Act, every such person shall be punished under the provisions, powers, and directions of this Act."

one of whom stated that he had visited the appellant's tent on several occasions when the sale of tea was going on, and that before appellant's men commenced to sell they stated that each pound of tea would contain a coupon entitling the purchaser to a prize, and that they had to return on the following day for their prizes. The other witness testified to buying several pounds of tea, which contained coupons for a tea caddy, a bread board, five stones of flour, and a butcher's knife respectively, and on presenting the coupons at appellant's tent she received the articles, and that the tea was good and worth the money she paid for it.

8. The manager and one of the servants of the appellant were called by the appellant, and proved that before the sale it was announced by one of them that each packet of tea would contain a coupon entitling the purchaser to a present, and that in fact each packet did contain such a coupon.

11. It was admitted by the respondent's witnesses that the tea was good and worth the money paid for it.

12. The justices being of opinion (1.) that although every packet of tea contained a coupon entitling the purchaser to a prize, yet there was a chance or uncertainty as to the value of such prizes; and (2.) that such chance or uncertainty constituted a lottery, and was in contravention of 42 Geo. 3, c. 119, convicted the appellant, and fined him 1*l.* with costs.

The question for the opinion of the Court was whether the transaction above described constituted a lottery within the meaning of 42 Geo. 3, c. 119.

If the Court should be of opinion that the conviction was legally and properly made, and the appellant liable as aforesaid, then the conviction was to stand, but if the Court should be of opinion otherwise, then the information was to be dismissed.

D. F. Steavenson, for the appellant. The facts stated in the case do not shew that there was any "game or lottery" within the meaning of 42 Geo. 3, c. 119, s. 2, and therefore the conviction was wrong. In the preamble of the statute the word "fraudulently" is used, and there clearly was no fraud in the present case. What was done was a sale of the tea and the article named on the coupon. Suppose instead of the coupons the

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articles themselves had been put into the packets; that would be a lottery if what was done here is. In *Wallingford* v. *Mutual Society* (1), Lord Selborne, L.C., said, speaking of the Lottery Acts, "One of those Acts plainly, on the face of its recitals (the enacting part not departing from those recitals) had reference to gambling transactions only; and in my judgment this was not a gambling transaction within the meaning of that Act. The other had reference to persons who kept lottery offices at which the public were invited to pay for lottery tickets; and that Act could have no application to this case." (2) The present case does not come under either of the heads there stated, and therefore is not within the mischief of the Lottery Acts. *Morris* v. *Blackman* (3) is distinguishable: there Martin, B., said, "The magistrates have found that the whole proceeding was a contrivance to conceal the real nature of the transaction." There is nothing of that kind here.

L. Goodrich (*Poland*, with him), for the respondent. This is a lottery, for the purchaser of each packet of tea takes his chance what prize he gets, and the fact that every coupon entitles the holder to some prize, and there are no blanks, does not make it the less a lottery. The defence raised here is the same as that in *Morris* v. *Blackman*. (3) [He also cited *Youdan* v. *Crookes*. (4)]

Cur. adv. vult.

May 10. The judgment of the Court (Field and Hawkins, JJ.) was delivered by

HAWKINS, J. The only question for our decision is whether the appellant kept a lottery within the meaning of s. 2 of 42 Geo. 3, 119.

In Webster's Dictionary a lottery is defined to be a "distribution of prizes by lot or chance," and a similar definition is given in Johnson; such definitions are in our opinion correct, and in such sense we think the word is used in the statute, and in this view we are justified by the language of some of the earlier statutes directed against unlawful games and lotteries. Take for instance the statute 12 Geo. 2, c. 28, s. 1, whereby, after reciting that persons setting up unlawful lotteries had unjustly "and fraudulently gotten to themselves great sums of money from the

(1) 5 App. Cas. 685.
(2) 5 App. Cas. at p. 697.
(3) 2 H. & C. 912.
(4) 22 J. P. 287.

children and servants of several gentlemen, traders, and merchants, and from other unwary persons," it is enacted among other things that if any person or persons "shall expose to sale any houses, lands, advowsons, presentations to livings, plate, jewels, ships or other goods, by any game, method or device whatsoever, depending upon or to be determined by any lot or drawing, whether it be out of a box, or wheel, or by cards, or dice, or by any machine, engine, or device of chance of any kind whatsoever," shall be liable on conviction to forfeit 200*l*., and by s. 4 it is enacted that "every such sale or sales of houses, &c., by any game, &c., or other device whatsoever, depending upon or to be determined by chance or lot, shall be void to all intents and purposes whatsoever."

Now what is the nature of the transaction upon which we are asked to pronounce our opinion?

In a tent, erected for that purpose, the appellant every Saturday night held a sale of one pound packets of tea, in each of which, it was publicly stated, and stated truly, there was a coupon entitling the purchaser to a prize, and each purchaser did in fact receive the prize mentioned on such coupon. The prizes were of infinite variety, both in character and value; nickel silver brooches, tea caddies, bread boards, quantities of flour, butchers' knives, glass vases, &c., were all represented by these coupons; but the article or prize represented by the coupon in any particular package offered for sale was not made known until after the sale of the package was effected and the coupon was inspected by the purchaser; all the intending purchaser knew was that he was buying a pound of tea containing a coupon for whatever prize might chance to be represented by it. For each package the sum of half-a-crown was paid. There can be no doubt that the appellant in enclosing and announcing the enclosure of the coupon in the packet of tea, did so with a view to induce persons to become purchasers and realize a profit to himself; and, although it was admitted by the respondent that the tea was good and worth all the money, it is impossible to suppose that the aggregate prices charged and obtained for the packages did not include the aggregate prices of the tea and the prizes. Nor can it be doubted that in buying a

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package, the purchaser treated and considered it as a purchase of the tea and the coupon, whatever its value might turn out to be. In other words he bought the tea coupled with the chance of getting something of value by way of a prize, but without the least idea what that prize might be. In making his purchase he exercised no choice—what he got he got without any option or action of his own will, but as the result of mere chance or accident. If the coupon alone sealed up had been offered for sale, the purchaser taking his chance whether it represented a pen or a silver pencil case, or if a number written on a slip of paper were sold, entitling the purchaser to some article the name of which was written against a corresponding number in an undisclosed list, could anybody doubt that these would have been lotteries? To us it seems utterly immaterial whether a specific article was or was not conjoined with the chance, and as the subject-matter of the sale.

Several cases were cited during the argument; it is not necessary for us to comment upon them. The cases of *Morris* v. *Blackman* (1) and *Reg* v. *Harris* (2), are, however, strongly confirmatory of the view we take.

Our answer to the question submitted to us, therefore, is that the transaction described constitutes a lottery within the meaning of 42 Geo. 3, c. 119, s. 2.

The form of the conviction is not before us. We are not therefore in a position to express any opinion as to whether it was legally and properly made. If the appellant was convicted as a rogue and vagabond, and the justices imposed a fine of 20*s.* in lieu of imprisonment, as they are entitled to do under 42 & 43 Vict. c. 49, s. 4, then we think the conviction was right. If, however, without convicting the appellant as a rogue and vagabond, they simply convicted him of keeping a lottery, and fined him 20*s.* for so doing, under 42 Geo. 3, c. 119, s. 2, then we think the statute 46 Geo. 3, c. 148, s. 59 (3), applies, and the conviction could not be upheld: see *Reg.* v. *Tuddenham.* (4)

(1) 2 H. & C. 912.

(2) 10 Cox, C. C. 352.

(3) By which all pecuniary penalties under the Lottery Acts are to go to the Crown, and are to be sued for in the name of the Attorney General, and proceedings in any other person's name are declared null and void, and are to be stayed.

(4) 9 Dowl. 937; 10 L. J. (M.C.) 163.

The case will be remitted back to the magistrates with our opinion and observations.

Case remitted.

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Solicitors for appellant: *Merediths, Roberts, & Mills,* for *Edward J. Thomas, Stockton.*

Solicitors for respondent: *Walker, & Co.,* for *Robinson, Darlington.*

A. M.

DAVEY *v.* THE LONDON AND SOUTH WESTERN RAILWAY COMPANY.

June 22.

Negligence—Railway Company—Level Crossing—Accident caused by Plaintiff's own Negligence.

The defendants' railway crossed a public footway on the level. About half-past four o'clock in the afternoon on the 29th of March the plaintiff, a foot passenger, while crossing from the down side to the up side of the railway, was knocked down and injured at the crossing by a train of the defendants on the up line. Owing to the position of certain buildings which stood by the line it was impossible for any one crossing from the down side to see a train coming until he got within a step or two from the down line, but a person standing on the down line or the six foot had a clear and uninterrupted view up and down the line for several hundred yards. The plaintiff stated that before crossing he looked to the right along the down line, but he admitted that he did not look to the left along the up line, and that if he had looked he must have seen the train coming. The engine driver did not whistle. There was a servant of the company employed as a gate-keeper at the crossing standing near the crossing, but he gave no warning to the plaintiff that a train was coming. The plaintiff, having brought an action against the company to recover compensation for his injuries, was nonsuited on the above facts being proved at the trial:—

Held, by Lord Coleridge, C.J., and Denman, J. (Manisty, J., not assenting), that the nonsuit was right, on the ground that the undisputed facts of the case shewed that there was no negligence on the part of the defendants, and that the plaintiff's own want of caution was the sole cause of the accident.

Affirmed on appeal 12 QBD 70 CA.

ACTION against a railway company for personal injuries occasioned to the plaintiff by the defendants' negligence. At the trial before Huddleston, B., the facts, so far as material, appeared to be as follows:—

The defendants' line of railway crossed a public footway and a carriage road, which appeared to be an occupation road to some houses, on the level. The plaintiff was knocked down and injured

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by a train of the defendants on the up line while he was in the act of crossing from the down line side to the up line side of the crossing. The accident occurred about half-past four o'clock in the afternoon on the 29th of March, and the afternoon was fine. There were carriage-gates at the crossing which were locked, a gate-keeper being stationed there by the defendants, whose duty it was to open and shut them when necessary, and there were wicket-gates for foot passengers which were not fastened. Owing to the position of certain buildings which stood by the line and a hedge, it was impossible for any one wishing to cross from the down side to see a train coming till he got within a step or two of the down line, but a person standing on the down line or the six foot had a clear and uninterrupted view up and down the line for several hundred yards. The plaintiff stated, in giving his evidence, that before endeavouring to cross he looked to the right along the down line, but he admitted that he did not look to the left along the up line till he was on that line and it was too late to avoid the train. He admitted that if he had looked along the up line before crossing the metals he must have seen the train coming. The defendants' gatekeeper was standing at the time on the opposite side of the crossing talking to two boys, with a furled flag in his hand. The plaintiff stated that he looked at the gate-man, but as he gave no warning the plaintiff said he thought no train was expected. The engine driver did not whistle.

On these facts the learned judge nonsuited the plaintiff. A rule nisi having been granted to set aside the nonsuit, and for a new trial, on the ground that there was evidence to go to the jury,

Murphy, Q.C., and *Arbuthnot*, shewed cause. There was no evidence here of any negligence on the part of the defendants, and certainly no evidence of any negligence giving rise to the plaintiff's injuries. Admitting that, as the decisions now stand, the question whether there was contributory negligence must always be for the jury, yet if, upon the undisputed facts, the accident is not caused by any negligence of the defendants, and the act of the plaintiff himself is the sole cause of the accident, then it is not a question of contributory negligence. Here there was

no duty to warn the plaintiff, because there was no danger to a person using reasonable caution. There was, therefore, no negligence on the part of the defendants. But if there were it cannot be said to be the cause of the accident, which arose from the plaintiff's own act in stepping on to the up line without looking to see if any train were coming on that line.

[They cited *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* (1); *Metropolitan Ry. Co.* v. *Jackson* (2); *Stubley* v. *London and North Western Ry. Co.* (3); *Skelton* v. *London and North Western Ry. Co.* (4).]

Kemp, Q.C., and *Dodd*, supported the rule. If there is evidence of negligence or a breach of duty by the defendants, without which the accident would not have happened, there is a case for the jury, and it is well settled that evidence of contributory negligence, however strong, cannot entitle a judge to withdraw the case from the jury. The company are not entitled to drive trains on a level crossing over a highway at a high rate of speed, without taking some reasonable means, as by whistling or otherwise, to warn persons lawfully using the highway of the approach of the train. There was evidence from which the jury might conclude that the crossing was a dangerous one, and if so, clearly the defendants were bound to use some precautions. The fact that the person injured may have been guilty of some want of care, which may or may not amount to contributory negligence, does not prevent its being negligence on the part of the company to give no warning, nor does it shew that such negligence of the company is not a cause of the accident.

[LORD COLERIDGE, C.J. Numbers of footpaths in country districts cross railway lines on the level. Must the driver whistle on approaching every one of these, or must there be a watchman at each of them to warn persons when trains are coming, although if they chose to look they could see the train perfectly well for themselves?]

It is contended that the company are bound to use ordinary and reasonable care, having regard to the circumstances of the particular case.

(1) 3 App. Cas. 1155.
(2) 3 App. Cas. 193.
(3) Law Rep. 1 Ex. 13.
(4) Law Rep. 2 C. P. 631.

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[LORD COLERIDGE, C.J. Is it not using ordinary care to presume that when there is no obstacle to vision people will look to see if a train is coming ?]

In the present case there was evidence of circumstances amounting to something in the nature of an invitation to the plaintiff. He is lulled into false security, and led to think that no train is expected, by the fact that the servant of the company whose duty it is to attend at the crossing gives him no warning that a train is coming.

[They cited *Bridges* v. *North London Ry. Co.* (1); *Cliff* v. *Midland Ry. Co.* (2); *Wyatt* v. *Great Western Ry. Co.* (3)]

LORD COLERIDGE, C.J. I am fully conscious of the difficulty of laying down general propositions with regard to cases like the present, in such terms as not to be open to comment and exception when applied to the particular circumstances of other cases. This rule of law, however, appears to be clear enough, though there is often a difficulty in its application; it is for the plaintiff to shew before he can recover that there was negligence on the part of the defendant, and that such negligence caused the injury to the plaintiff. In the present case the plaintiff must therefore make out two things: first, that the defendants, through their servants, did or omitted to do something which a reasonably careful person would not have done or omitted to do; and, secondly, that the plaintiff's injury was thereby occasioned. It has certainly been determined in several cases, which have not been overruled so far as I am aware, that, if the plaintiff in attempting to establish his case not only does not shew any act or omission of the defendants from which the accident arose, but, on the contrary, does shew that he himself caused the damage, then his case fails, because he proves affirmatively that he himself is the author of his own wrong. If, therefore, by the uncontradicted facts, on the truth of which the plaintiff must rest his own case, it is shewn that the damage to the plaintiff was caused by himself, it seems to me that the learned judge was right in nonsuiting the plaintiff, because he failed in sustaining the onus which he was

(1) Law Rep. 7 H. L. 213. (2) Law Rep. 5 Q. B. 258.
(3) 6 B. & S. 709.

bound to sustain, viz., of shewing that the injury resulted from the defendants' acts. Now it seems to me clear, upon the uncontradicted evidence of the plaintiff himself, that he himself caused the accident by walking straight into a train which he might have seen. There is a double line of rails. He comes first upon the down line on which the train is not coming. There is then the width of the down line, and the interval between the two sets of rails between him and the danger. If he had only taken the precaution of looking to the left along the up line while crossing over this space he must have seen the coming train. He did not look to see what was plainly to be seen approaching, and in consequence he walked straight into the danger. The suggested answer to this way of putting the case is as follows: it is said that the plaintiff was not bound to look along the line for two reasons; first, because it was a dangerous crossing and the defendants were bound to whistle, or do something or other by way of warning people of the approach of the train. It is not contended that there was any whistling, and therefore it is said that the defendants were negligent. Secondly, it is said that there was a man there and it was his duty to warn persons when he knew that a train was coming, and that if he had warned the plaintiff he would not have come across. Now I am not disposed to lay it down as a general proposition that a train must always whistle on approaching a level crossing. So far as the carriage gates were concerned, it appears that they were carefully guarded and locked. Every possible care seems to have been taken in that respect, but the gates across the public footpath could not be dealt with in the same manner, and people could get through them. I do not see, under the circumstances, that it was the duty of the railway people to whistle, nor do I see that it was the duty of the man, who was obviously there for the purpose of unlocking the carriage gates when necessary, to warn everybody that came across. If on the one hand it is said that a person crossing might reasonably look for warning if a train was coming, on the other hand the answer seems to be that the gate-keeper might reasonably rely on a person's looking up and down the line to see if a train was coming before crossing. I cannot see that there was any duty incumbent on the company which was not discharged.

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It does not seem to me of much use to go through all the authorities on this subject. They are very numerous, and it is obvious that from time to time there have been waves of opinion in one direction and the other. At one time the view has been in favour of leaving everything to the jury in such cases; but it seems to be settled now that it is for the judge to say whether there is anything that can be reasonably held to be evidence of negligence for the jury, and if there is it is for the jury to say what the effect of it is. It unfortunately happens that where one judge may think that there is no reasonable evidence of negligence others may not agree with him, and it is possible other judges may not agree with my view of this case. That is a difficulty that is inherent in such cases, but one must act on one's view of what is good sense. It seems to me that in this particular case my opinion is supported by a hypothetical case put by way of example by Lord Cairns in *Dublin, Wicklow, and Wexford Ry. Co.* v. *Slattery* (1), which seems as nearly as possible identical in its facts with the present case. He says (p. 1166): "If a railway train which ought to whistle when passing through a station were to pass through without whistling, and a man were in broad daylight, and without anything either in the structure of the line or otherwise to obstruct his view, to cross in front of the advancing train and to be killed, I should think the judge ought to tell the jury that it was the folly and recklessness of the man and not the carelessness of the company which caused his death. This would be an example of what was spoken of in this House in the case of *Jackson* v. *Metropolitan Ry. Co.* (2), an *incuria*, but not an *incuria dans locum injuriæ*. The jury could not be allowed to connect the carelessness in not whistling with the accident to the man who rushed with his eyes open on his own destruction."

That seems to me, if I may be permitted to say so, excellent sense and very forcibly expressed. It seems to me exactly to describe this case and to shew that there was here really no evidence for the jury.

I am for these reasons of opinion that this rule should be discharged.

(1) 3 App. Cas. 1155. (2) 3 App. Cas. 193.

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DENMAN, J. I am of the same opinion. I think that the undisputed facts of this case shew that this accident was palpably and unquestionably due to the plaintiff's own folly and recklessness and nothing else. The argument for the plaintiff appears to be that he was not guilty of folly and recklessness for two reasons; first, because there was no whistle to announce the approach of the train, and therefore he was not bound to expect the coming of a train. It seems to me that the argument entirely fails; according to his own account before he attempted to cross the line of rails on which the accident took place he had to cross the down line and from thence it was possible to see for a long distance along the line either way. He saw that no train was coming on the down line but he did not take the trouble to turn his eyes and look along the up line. If he had, he could have seen 300 or 400 yards. It seems to me that it is no answer to the contention that the accident resulted from his own folly that there was no whistle, for I do not see that the absence of a whistle played any material part in causing the accident. Secondly, it is said that the accident was not the result of his own folly, because there was a man in the employ of the company standing near the crossing, at a point from which apparently he could not see the train so far off as the plaintiff could himself have seen it, and this man did not give the plaintiff any warning. It seems to me that the fact that the man was there and did not warn him furnishes no argument against the proposition that the accident was solely due to the plaintiff's own folly and recklessness. The man at the gate had other duties to perform. He was there to attend to the opening of the gates, and it does not seem to me open to the plaintiff to say that the fact, that the man, because he was otherwise occupied, or for some such reason, did not warn him, amounted to an invitation to him to cross the line without looking to see if he could do so with safety. It appears to me that the plaintiff brought his injuries upon himself by his own act as much as if seeing the train coming he had tried to cross in front of it.

Under these circumstances, it seems to me that the case comes exactly within the observations of Lord Cairns which have been cited by my Lord, and by which I think we ought to hold this case to be governed.

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MANISTY, J. I do not feel sufficient confidence in my own opinion as to this case to dissent formally from the decision of my Lord and my Brother Denman, but I am not prepared to say that I assent to it. I must say that if the case had been tried before me I should have left it to the jury. There are circumstances which lead me to doubt whether there was not a question for the jury. There was, as it seems to me, evidence that this was a dangerous crossing. There are obstacles on each side which prevent persons about to cross from seeing approaching trains until they are almost, if not quite, upon the line. It is impossible that any one can have a greater respect for the opinion of Lord Cairns than I have, but I understand that the dictum from his judgment which has been cited applies to cases where there are no obstructions to prevent persons from seeing the trains as they come up to the crossing. That case seems to me to differ from a case in which a man cannot see the trains until he is on the line or only a step or two from it. It seems to me that if the crossing is dangerous there is a duty on the part of the defendants to take reasonable precautions for the safety of persons crossing, and then it would be for the jury to say whether they had done so in this case.

Rule discharged.

Solicitor for plaintiff: *J. P. Godfrey.*
Solicitors for defendants: *Bircham & Co.*

E. L.

[IN THE COURT OF APPEAL.]

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June 23.

BEER *v.* FOAKES.

Accord and Satisfaction—Debtor and Creditor—Contract—Consideration—Contract by Creditor to take less than sum due, whether valid.

Judgment for a specific sum having been obtained by the plaintiff in an action, an agreement in writing was made between the plaintiff and defendant whereby, in consideration that the defendant would pay part of the sum on the signing of the agreement and the remainder to the plaintiff or her nominee by equal half-yearly instalments, the plaintiff undertook not to take any proceedings on the judgment. The defendant duly performed all the terms of the agreement on his part:—

Held, by the Court of Appeal, reversing the decision of the Queen's Bench Division, that the agreement was not binding on the plaintiff, there being no consideration for it, and that therefore the plaintiff was entitled to issue execution for interest on the judgment debt.

Issue directed under Order XLII., rule 19, to try whether any and what amount was due from the defendant to the plaintiff upon a judgment obtained more than six years before the application.

In August, 1875, the plaintiff recovered judgment against the defendant for 2090*l.* in an action on certain bills of exchange accepted by the defendant.

On the 21st of December, 1876, an agreement in writing was made between the plaintiff and the defendant, in which, after reciting the recovery of judgment for 2090*l.*, and also that the defendant had requested the plaintiff to give him time to pay such judgment, which she had agreed to do, it was witnessed "that in consideration of the said J. W. Foakes paying to the said Julia Beer, on the signing of this agreement, the sum of 500*l.* (the receipt whereof she doth hereby acknowledge) in part satisfaction of the said judgment debt of 2090*l.*, and on condition of his paying to her or to her executors, administrators, assigns, or nominee, the sum of 150*l.* on the 1st day of July and the 1st day of January or within one calendar month after each of the said days respectively in every year until the whole of the said sum of 2090*l.* shall have been fully paid and satisfied, the first of such payments to be made on the 1st day of July next, she, the said Julia Beer, hereby undertakes and agrees that she,

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her executors, administrators, or assigns, will not take any proceedings whatever on the said judgment."

This agreement was drawn up by a solicitor, and upon the execution of it by the parties the defendant paid the sum of 500*l.* to the plaintiff, for which a receipt was indorsed upon the agreement.

The defendant duly paid all the instalments of 150*l.* according to the agreement, making, together with the 500*l.* paid upon execution thereof, the sum of 2090*l.* recovered upon the judgment. The last payment was made in June, 1882, and about that date the plaintiff made a claim for an additional sum of 360*l.* in respect of interest on the sum recovered on the judgment from the date thereof.

The plaintiff applied by summons at chambers under Order XLII., rule 19, to be allowed to issue execution or otherwise proceed on the judgment against the defendant in respect of the last-mentioned sum, when the Master directed the present issue. At the trial before Cave, J., with a jury, during the last Hilary Sittings in Middlesex, the foregoing facts were proved in evidence or admitted, and Cave, J., ruled that the defendant having paid all the sums due under the agreement of the 21st of December, 1876, the plaintiff was not entitled to issue execution for any sum upon the judgment, and directed a verdict to be entered for the defendant.

The plaintiff obtained a rule calling upon the defendant to shew cause why there should not be a new trial on the ground of misdirection.

May 2. *Holl, Q.C.* (*Winch* with him), shewed cause. The direction was right. There are numerous authorities to the effect that where there is a legal benefit, or possibility of legal benefit, to the creditor under an agreement to take a less sum than the sum due the doctrine of *Cumber* v. *Wane* (1) does not apply. [He was stopped.]

A. B. P. Gaskell supported the rule. It is submitted that the present case is governed by *Cumber* v. *Wane* (1), which has in recent times been recognised as still a binding decision: *God-*

(1) 1 Sm. L. C. 8th Ed. 357; 1 Str. 426.

dard v. *O'Brien*. (1) The principle has only been departed from where a negotiable instrument—as a promissory note or cheque payable on demand—has been given to secure payment of a smaller sum than that due to the creditor, but no case has gone so far as to decide that the doctrine of *Cumber* v. *Wane* (2) is not still applicable where there is no negotiable instrument, and the agreement is (as it is here) simply to take a less sum, payable by instalments, than the judgment debt and interest.

WATKIN WILLIAMS, J. I am of opinion that this rule should be discharged. The point argued here appears not to have been taken before Cave, J., at the trial. It was there contended that upon the true construction of the agreement the plaintiff's rights with respect to the judgment were not affected, although the agreement was silent about interest, and therefore that she was still entitled to claim interest. It was not contended that the agreement itself was made without any consideration and therefore invalid. That point however has been taken here, and it is said that the plaintiff was entitled to issue execution upon the judgment. I am of opinion that the agreement was made upon good consideration, and that the plaintiff is not so entitled. The decision in *Cumber* v. *Wane* (2), which is said to lead to a different conclusion, depends upon a mere technicality. Judges have long tried to escape from the doctrine, which is a reproach to English law, that a creditor may not make a valid agreement to take a smaller sum than the amount of his debt. I accept *Cumber* v. *Wane* (2) as an authority binding upon this Court, but where the circumstances of a case cause it to differ, though in a slight degree, from the simple and naked transaction dealt with in *Cumber* v. *Wane* (2) sufficient is shewn to distinguish it from that case. In the present case the debtor wanted time, and the creditor was willing to accede to his request on condition that he would enter into an agreement in writing to be drawn up by a solicitor, and binding the debtor to pay part of the debt down and further sums by instalments to be paid to any nominee the creditor might select. I am of opinion that these terms are sufficient to prevent the agreement from being a mere nudum

(1) 9 Q. B. D. 37. (2) 1 Sm. L. C. 8th Ed. 357; 1 Str. 426.

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pactum, and that the plaintiff ought not to be allowed to proceed to execution upon this judgment after having expressly agreed not to do so.

MATHEW, J. I am of the same opinion. It would perhaps be sufficient to dispose of the case by saying that this point was never taken or suggested at the trial or at chambers. But we may go further, and say whether or not the point now argued is a bad one. It is material to notice that by the agreement the debtor binds himself to pay the creditor's nominee. That stipulation renders the document available as a security. Upon the authority of the decisions, I think there was abundant consideration for the agreement. The rule must be discharged.

Rule discharged.

W. A.

The plaintiff appealed.

A. B. P. Gaskell, for the plaintiff.
Holl, Q.C., and *Winch*, for the defendant.

BRETT, L.J. The true construction of this agreement, supposing it to be binding on the plaintiff, is that if the instalments are duly paid the plaintiff shall not take any proceedings to recover her judgment, and therefore shall not have any right to interest thereon. My opinion, however, is that the agreement is not binding on the plaintiff. The defendant was bound to pay the judgment debt immediately, and it was a debt bearing interest. Then by this agreement the defendant gets time for the payment, but although the plaintiff agreed to give time, she might at any time have changed her mind, and was not bound by the agreement for there was no consideration for it. It is said that there was a consideration because the agreement binds the defendant to pay the plaintiff or her executors or nominee; but that is not so, for there is nothing in it to bind the defendant, although nevertheless if he did pay the plaintiff or her executors or nominee he would have performed the condition. I do not know what is the meaning of nominee in this agreement. It created no greater obligation on the defendant than the law created, and it has, I think, no legal or practical meaning. The defendant ought to

have paid the judgment debt and legal interest thereon, and the plaintiff's right is now the same as if this agreement had never existed.

LINDLEY and FRY, L.JJ., concurred.

Judgment for the plaintiff for the interest due.

Solicitor for plaintiff: *H. W. Mackreth.*
Solicitor for defendant: *W. H. Hudson.*

W. P.

THE GREAT NORTHERN STEAMSHIP FISHING COMPANY, APPELLANTS; EDGEHILL, RESPONDENT.

June 6.

Ship—Neglect of Seaman to join Ship—Merchant Shipping Act (17 & 18 *Vict.* c. 104), *s.* 243—*Summary Proceeding before Justices—Exclusion of Civil Remedy—Employers and Workmen Act* (38 & 39 *Vict.* c. 90), *s.* 4.

The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 243,—which enables a seaman who neglects without reasonable cause to join his ship to be punished upon proceedings before a court of summary jurisdiction with imprisonment and forfeiture of part of his wages—by implication takes away any other remedy against the seaman for the breach of contract, and the shipowner cannot, where the amount which he claims does not exceed 10*l.*, take proceedings for the recovery of damages under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 4.

CASE stated by justices under 20 & 21 Vict. c. 43.

April 7. *Dodd*, for the appellants.
No counsel appeared for the respondent.

The facts and arguments sufficiently appear in the judgment.

Cur. adv. vult.

June 6. The judgment of the Court (Denman, J., Field, J., and Hawkins, J.) was delivered by

FIELD, J. This is a case stated by justices upon the hearing of a complaint by the appellants (who are shipowners) against the respondent (an articled seaman) for having without reasonable excuse neglected to join his ship.

The complaint was not made under s. 243 of the Merchant

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Shipping Act of 1854, which makes the act an offence; but as a "dispute" under the provisions of the Employers and Workmen Act of 1875, by which in such case civil summary jurisdiction to the amount of 10*l.* is given to justices.

The information alleged that the respondent being lawfully engaged to serve on board a fishing cutter, had neglected to join according to his agreement, whereby the appellants had sustained damage to the amount of 20*l.*, but in respect whereof they claimed only up to the 10*l.* limit.

Upon the hearing the appellants proved that in consequence of the respondent's neglect to join they had been obliged to engage a substitute, and had sustained damage to the amount of 20*l.*, but the justices dismissed the complaint, holding that the appellants were confined to the specific remedy given by s. 243 of the Merchant Shipping Act, and could not resort to any other; acting probably upon the principle of the cases of *Stevens* v. *Jeacocke* (1) and *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (2), and which they conceived to be applicable to the present. There may, however, be a distinction between those cases and this. In the statutes there under consideration, the duty for the breach of which the summary remedy was provided, was either created by the statute itself or at least it appeared from its provisions that no intention existed to annex to the breach any individual right of action.

But the duty under consideration in this case is an ordinary obligation to perform an ordinary contract of service, to the breach of which has been annexed the general remedy by action in favour of the employer ever since the contract of service itself. In order, therefore, to be able to hold that the employer is deprived of that remedy, the mere annexation of a new specific remedy would not by itself be sufficient, it must also appear from the statute to have been the intention of the Legislature that the general remedy should not co-exist—otherwise the new remedy will be merely cumulative and in aid of the general one: *Mayor of Lichfield* v. *Simpson.* (3)

It is not, however, necessary that this intention should appear

(1) 11 Q. B. 731. (2) 2 Ex. D. 441.

(3) 8 Q. B. 65.

in express terms, it may be implied, and will and ought to be so if the future application of the general remedy is inconsistent with the new legislation. In such a case the exclusion will take place just as effectually as if the statute had expressly declared it.

What then are the provisions of the statute?

At the time of its passing the action in the county court was the only practical remedy of the master for any of the breaches specified in the 243rd section, and a more speedy and effective remedy was necessary in the interest and for the protection of the master. Accordingly this was provided for by making the breaches specified in the section "offences" cognizable by a court of summary jurisdiction and punishable by imprisonment.

Now if the Legislature had been content with that provision and had gone no further, there would have been little, if any, ground for saying that the general remedy was intended to be interfered with, for the imprisonment might well have stood with the right of action and would have been cumulative merely.

But the section does not stop there; it proceeds to give the justices jurisdiction to award (in addition to the punishment) to the master by way of forfeiture out of the seaman's wages a portion of what he otherwise would have been entitled to recover as damages in his action. Whilst the statute, therefore, thus in the interest of the master gives him a more speedy remedy than he had before—it proceeds in the interest of the seaman to limit the master's right of recovery, both as to amount and the fund out of which the sum is payable. In other words, the master, instead of having the right to claim from the justices the whole damage sustained, which was his right by action, can only recover a portion of his damage, and that portion only by way of forfeiture out of wages, and not by process of judgment and execution.

Now can the two remedies, by action and by statute, stand together? We think not. If they can, we fail to see what advantage the seaman gains by the limitation so obviously made for his benefit.

There is no provision in the Merchant Shipping Act, as there is in the Trespass to Game and many other Acts, making the adoption of the new summary remedy a bar of the common law right, and if it was intended that the master should have both

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remedies, it would be competent to him to proceed against the seaman under the 243rd section, and as the Act originally stood obtain a sentence of imprisonment and an award of the forfeiture of one day's wages (being all that the justices in the exercise of their discretion might determine to impose) and then proceed to recover by action for damages the amount of the second or further day's pay, and the expense of finding a substitute, and any other legal damage. The existence of this double remedy for a portion of the same identical thing seems to us so unreasonable as to prevent our holding it in the absence of plain words to that effect.

Nor does it appear to us that this construction of the statute is affected by 43 & 44 Vict. c. 16, s. 10.

By that section a seaman is no longer liable to imprisonment for neglect to join—but a more effective remedy is given to the master by empowering him, with or without the aid of a peace officer, to convey the seaman on board; but this section has intentionally left the remedy of the master by forfeiture before justices still standing as the only remedy under the 243rd section.

Upon the whole, therefore, we have come to the conclusion that the Legislature, in conferring upon the master a new right, intended to limit his old one—and in exposing the seaman to a new liability by imprisonment or capture, intended to reduce his pecuniary one—and we see no way of effecting this intention except by holding that the specific is in lieu and not in aid of the general remedy.

The right and liability to recover and pay only a part of the pecuniary damage sustained by the master, is of necessity inconsistent with those of recovering and paying the whole; and one of the two must give way, and it must therefore be that which exists only by implication, and not that which is express.

We think, therefore, although not without some hesitation, that the magistrates have rightly dismissed the summons, and that the appeal must follow the same fate.

Judgment for the respondent.

Solicitors for appellants: *Pritchard & Son, for A. M. Jackson.*

A. P. S.

LAWSON *v.* THE WALLASEY LOCAL BOARD.

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Jan. 22.

Contract—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 174—*Certificate of Engineer—Wallasey Improvement Acts*, 1858 (21 & 22 *Vict. c. lxiii.*), *and* 1861 (24 *Vict. c. iv.*).

The Wallasey Local Board, a local board of health under the Public Health Act, 1848 (11 & 12 Vict. c. 63), and an urban sanitary authority under the Public Health Act, 1875 (38 & 39 Vict. c. 55), were authorized by the Wallasey Improvement Acts, 1858 and 1861, to acquire and work certain ferries between Liverpool and the Cheshire side of the Mersey, amongst others Seacombe Ferry. In May, 1878, they entered into a contract under their seal with the plaintiff for the removal by dredging of a large quantity of soil from the bed of the river at Seacombe Ferry for 5000*l.*, the work to be executed under the direction and to the satisfaction of the engineer of the board by a given day, subject to an extension of time (as the engineer might think reasonable) in case the staging on the site to be dredged (which belonged to another contractor) should not be removed in time to enable the plaintiff to complete the work by the day named.

The general superintendence of the works connected with their ferries was intrusted by the board to the engineer, subject to the control of a "ferry-works committee" appointed under s. 200 of the Public Health Act, 1875, and acting under the powers conferred by that Act. The contract between the board and the plaintiff contained a clause that, "if any difference shall arise between the local board and the contractor concerning the work hereby contracted for, or any part thereof, *or concerning anything in connection with this contract*, such difference shall be referred to the engineer, and his decision thereon shall be final and binding on the local board and the contractor."

In answer to a complaint by the plaintiff on the 15th of January, 1879, that his progress was obstructed by the non-removal of the staging, the engineer wrote, "I note that you are put to extra expense consequent on this delay, and I am prepared to compensate you for it on settlement." This was reported by the engineer to the ferry works committee, with an intimation that, "inasmuch as the plaintiff was not able to complete his contract until the piles had been removed, the board would be liable for the rent of the dredgers until the plaintiff could re-commence." The committee thereupon by a minute which was subsequently confirmed by the board ordered the engineer to use all speed in the removal of the piles. The staging referred to was not in fact removed until September, 1879, and the plaintiff was put to considerable expense in consequence of this delay, by the detention of his plant and for the hire of dredgers and machinery, &c. The works were completed on the 11th of November.

After some correspondence between the plaintiff and the engineer as to the amount due to the former on account of the contract and for delay, the latter gave the plaintiff the following certificate:—"I certify that Mr. George Lawson has completed to my satisfaction the work which he contracted to execute at Seacombe Ferry for the Wallasey Local Board, and that he is therefore entitled to the sum of 500*l.*, being the balance of the sum of 5000*l.* mentioned in his

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contract after deducting 4500*l.* already paid him on account; and I further certify that Mr. George Lawson is entitled to the further sum of 565*l.* 19*s.* 2*d.* for extra work executed by him at Seacombe Ferry in connection with the said contract, being the balance of 1324*l.* 10*s.*, after deducting 758*l.* 10*s.* 10*d.* paid by the Wallasey Local Board at his request for the hire of dredger, tug, hoppers, and insurance; and that such several balances of 500*l.* and 565*l.* 19*s.* 2*d.* are to be received by Mr. George Lawson in full satisfaction of all his claims on the Wallasey Local Board for work executed by him at Seacombe pursuant to the contract and *in connection with it.*"

The plaintiff declined to accept those sums in satisfaction, but claimed a balance of 2489*l.* 3*s.* 11*d.*

It was admitted that none of the forms prescribed by the Public Health Act, 1875, s. 174, were complied with, that there was no consideration for any contract entered into or action taken by the defendant board except as appeared in the case, and that no document other than the original contract was under the seal of the board:—

Held, first, that, looking at the terms of the contract, which provided for a definite amount of dredging to be done by a certain time, with power to the engineer to extend that time as he should think reasonable in case of the non-removal of staging, there was an implied contract on the part of the board that the removal of the staging should not be unreasonably delayed; and that for this breach, if proved, the plaintiff would be entitled to recover damages from the defendants,—the proper measure of such damages being the loss which the plaintiff had unavoidably sustained in consequence of such unreasonable delay; secondly, that this was not a difference "concerning a matter in connection with the contract," as to which the decision of the engineer was to be conclusive.

THIS was a special case raising several questions for the opinion of the Court. These questions and the general facts sufficiently appear from the judgment.

The case was argued in the last Michaelmas sittings before Denman and Manisty, JJ., by

Webster, Q.C. (with whom was *F. Radcliffe*), for the plaintiff, and by

C. Russell, Q.C. (with whom was *Ashton Cross*), for the defendants.

The arguments are fully set out in the judgment.

The following authorities were referred to,—*Roberts* v. *Bury Improvement Commissioners* (1); *Wells* v. *Corporation of Kingston-upon-Hull* (2); *Young* v. *Corporation of Leamington* (3); *Eaton*

(1) Law Rep. 4 C. P. 755; 5 C. P. 310.

(2) Law Rep. 10 C. P. 402.

(3) 8 Q. B. D. 579.

v. *Barker* (1); *Sharpe* v. *San Paulo Ry. Co.* (2); *Dunaberg and Witepsk Ry. Co.* v. *Hopkins* (3); *Scott* v. *Corporation of Liverpool* (4); *Hunt* v. *Wimbledon Local Board.* (5)

Cur. adv. vult.

The judgment of the Court (Denman and Manisty, JJ.,) was delivered by

DENMAN, J. This was a special case in which several questions were stated for the opinion of the Court:—

The defendants are a local board under the Public Health Act, 1848, and an urban sanitary authority under the Public Health Act, 1875; and by Acts of 1858 and 1861 (6) were authorized to hold, use, and work Seacombe Ferry, and receive tolls for its use, and by the latter Act were incorporated and given a common seal. Under the powers of the Acts of 1858 and 1861, the defendants acquired the fee-simple of the ferry, with the foreshore and other appurtenances thereto, and purchased all steam-boats and plant necessary to work it as a ferry, and had received from the public the tolls permitted to be levied by the said Acts; but the moneys received had not been sufficient for the working of the ferries, and the deficits have been made good out of the rates.

On the 2nd of May, 1878, the plaintiff entered into an agreement under the seal of the defendants, the material facts of which are set out in par. 4 of the case. The plaintiff was to dredge and remove 10,000 yards of the bed of the Mersey immediately contiguous to the ferry. He was to find labour of all kinds necessary in the work, and all plant, &c., and to bear all costs of labour and appliances during the execution and fulfilment of the work. He was to execute and completely finish the work under the direction and to the satisfaction of Mr. Carson, the engineer of the board. Clause 6 of the contract was as follows:—"The contractor is to complete the work at such time or times as he thinks right, and leave the same free from obstruction of any kind whatever on or before the 1st day of October, 1878, subject however to an extension of time in case the temporary staging now erected on the site

(1) 7 Q. B. D. 529.
(2) Law Rep. 8 Ch. 597.
(3) 36 L. T. (N.S.) 733.
(4) 28 L. J. (Ch.) 230.
(5) 4 C. P. D. 48.
(6) 21 & 22 Vict. c. lxiii. and 24 Vict. c. iv.

49 Jur. N.S. 105

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of the said work in connection with a new ferry at Seacombe aforesaid should not be removed within such a time as will enable the contractor to complete the work by the said 1st of October; in which case he is to be entitled to such an extension of time as the engineer may think reasonable. But, should the contractor fail to complete the said work within the aforesaid time or such extension of time as aforesaid, he is to pay the local board as compensation for such delay 5*l.* for every week during which the work shall so remain unfinished; and the local board are to be entitled to recover the same either by proceedings at law or by way of deduction from any moneys remaining due from the local board."

By clause 8 the defendants were to pay on account of the engineer's certificate instalments of 80 per cent. of the value done during each month, and the balance of 5000*l.* (the contract price) on the completion of the work. Clause 9 was as follows:—"If any difference shall arise between the local board and the contractor *concerning the work hereby contracted for*, or any part thereof, *or concerning anything in connection with this contract*, such difference shall be referred to the engineer, and his decision thereon shall be final and binding on the local board and the contractor."

The general superintendence of the work at Seacombe Ferry was intrusted to Carson, the engineer, subject to the control of a ferry-works committee appointed under s. 200 of the Public Health Act, 1875. He reported to the committee at each of its meetings as to the progress of the contract. His reports were discussed and entered on the minutes of the committee, which were submitted to and confirmed (or not) by the next board of the defendants. The plaintiff's dealings were all through the medium of the engineer, and not directly with the defendants.

The plaintiff did not commence his dredging operations under the contract until the 9th of September, 1878; and on the 7th of January, 1879, he wrote to the engineer that he had fulfilled his contract, and claimed payment of a balance. A correspondence ensued, in which the engineer insisted that the plaintiff had not fulfilled his contract, and disputed his measurements; and on the 15th the plaintiff wrote, stating that he had withdrawn his notice asserting that he had fulfilled his contract, and proceeding as

follows,—"I am now ready to remove the remainder of the excavations as shewn on tracing. To enable me to do so, it is necessary that the timber staging now on the ground be removed, as no dredging can be done until this is taken down. I must, however unwilling, charge you all costs from this date until I am enabled by the removal of the timber erections to resume operations." The engineer answered,—"I am urging Messrs. Brassey to remove the staging, so as to enable you to proceed with the dredging. I note that you are put to extra expense consequent on this delay, and I am prepared to compensate you for it on settlement."

The engineer reported these transactions and letters to the ferry-works committee, and added, "inasmuch as [plaintiff] is not able to complete his contract until the piles used by Messrs. Brassey have been removed, the board will be liable for the rent of the dredgers until [the plaintiff] can recommence." The committee thereupon ordered "that Mr. Carson take care that all speed is used by Messrs. Brassey in the removal of the piles." This minute was confirmed by the board on the 6th of February, 1879.

It must be taken, for the purpose of raising the questions of law submitted to us, though not admitted for any other purpose, that the staging and piles referred to in these minutes and correspondence was "temporary staging" which rendered it impossible for the plaintiff to complete his dredging until they were removed; that they were not in fact removed until September, 1879; and that the plaintiff was put to considerable expense in consequence of this delay, by the detention of his plant and the hire of dredgers and machinery, and for wages and other necessaries.

From the date of the engineer's letter of the 15th of January, 1879, the plaintiff periodically sent in to him accounts or invoices of the amounts claimed by him for such detention. A specimen is set out in the case, headed "Statement of expenses incurred from the 15th of January to the 1st of February, 1879, on account of dredger waiting for removal of temporary staging from site still to be dredged." It then states the sums assigned to each item, amounting to 15*l.* odd per day. The accounts so sent in up to the 28th of February, 1879, amounted to 588*l.* 4*s.* 6*d.*

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It does not appear clearly from the case what was being done between the 28th of February and October; but early in October, the dredger originally employed by the plaintiff having left the Mersey, he employed another dredger belonging to the London and North Western Railway, and on the 11th of November the works were completed. A correspondence thereupon took place between the plaintiff and the engineer as to a settlement. On the 10th of December the plaintiff writes that he wishes to see the engineer about the form in which his account is to be sent in, and intimates that he has paid nearly 8000*l.*; that the hire of the London and North Western dredger, &c., will bring up the cost to more; and that, to give a fair profit, he will require 10,000*l.*, less sums paid on account. The engineer replies on the 15th, "I am surprised at the figures you state." On the 30th the plaintiff writes referring to the contract, and stating that he had been delayed by the non-removal of the staging for 107 days, and inclosing an account for 10,612*l.* 3*s.* 10*d.*, which included a claim for dredging more than the amount provided for in the contract and the 581*l.* 4*s.* 6*d.* claimed down to the 28th of February, and a large sum for delay and hire of the London and North Western dredger.

On the 7th of January, 1880, the engineer wrote a letter acknowledging the receipt of this account, disputing the claim for dredging except for the 10,000 cubic yards provided for by the contract. [This claim in excess was afterwards withdrawn.] In this letter he says, "You suffered from delay on our part in the completion, for which you are entitled to have an extension of time, and also for any money out of pocket due to this cause. It is clear that the hire of the dredger during the time we prevented her working is of the latter nature; and the rate we arranged for her, and at which your account of March 4th, 1879, was made out, was at 15*l.* 10*s.* per day; and this fixes your compensation." He then offered to allow at that rate for thirty-eight days down to the 28th of February, 1879, and added, "Then your contract was prolonged, and for this you ought to have a consideration; and then there is the contract amount in full; and these three items will make up your total." Both the plaintiff and the engineer expressed an opinion that they would

be able to come to an agreement; and it appears that on the 21st of January, 1880, a statement was handed by the plaintiff to the engineer in which the former claimed, first, the contract amount, then 2807*l.* for damage caused to the plaintiff by non-removal of Brassey's staging until July, 1879, causing the work to be done in the winter months and the dredger to be lying idle for more than 100 days. This item appears also to have included a charge (afterwards abandoned) for dredging more than 10,000 cubic yards. The rate per diem charged for the dredger and other matters was 26*l.* 4*s.* 9*d.* This account also included the 588*l.* 4*s.* 6*d.* mentioned above, and a sum of 473*l.* 4*s.* 1*d.* for the hire of the London and North Western dredger, and concluded as follows:—"In consideration of the longer period of time spent on the work, and plant lying idle that ought to have been employed elsewhere, superintendence, &c., I ask to be allowed the sum of 500*l.* Total, 9639*l.* 3*s.* 10*d.*"

On the 9th of February the plaintiff writes to the engineer,—"I trust that you have found my account correct in every particular, and that I may receive the sum due shortly." On the 26th the engineer wrote,—"Without prejudice to the rights of either party to the contract, I suggest the arrangement on the back for your consideration, as being a suitable settlement of the questions raised in your statement of account." This account "on the other side" allowed 5000*l.* for the contract, 588*l.* 4*s.* 6*d.* for detention of the Clyde dredger, 150*l.* for ten days in respect of the London and North Western Railway dredger, 367*l.* 15*s.* for fifteen days for the Clyde dredger (i.e., at the rate of 24*l.* odd per day), 100*l.* allowance for plant, and one or two smaller allowances; and on the other debited the plaintiff with the 5000*l.*, and also with 420*l.* for the London and North Western Railway bill for their dredger, and with sums for the hire of tugs and hoppers, &c., and brought out a total of 6334*l.* 10*s.* 2*d.* for the items on the credit side, and a balance of only 575*l.* 19*s.* 4*d.* as due to the plaintiff.

The plaintiff on the 28th of February wrote, "I have yours of the 26th. You have quite surprised me by the results you have arrived at. I must insist upon being paid the sum named in the last account rendered to you." Nothing more occurred until the

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1st of May, 1880, when the plaintiff wrote, "I really wish you would certify for the sum due for dredging at Seacombe." On the 5th of May the engineer wrote a letter saying that he had carefully considered the explanations and statements made by the plaintiff, and ended, "I have no doubt of being able to advise you whether I have seen any reason to depart from that decision early next week." On the 26th of May the plaintiff wrote as follows: "This account must now be settled. To facilitate matters, I inclose statement of what I am now, after mature deliberation, prepared to accept. Please to read the explanations I have already made, and take into consideration the time spent on the work. I will expect a certificate for the 3451*l.* 10*s.* 1*d.* before the end of this week." In this account the plaintiff remodels his claim, admitting most of the reductions suggested in the engineer's account, reducing the number of days for which he claimed for the detention of the dredger (beyond the 588*l.* 4*s.* 6*d.*), and, after making other reductions, bringing out a balance of 3451*l.* 10*s.* 1*d.*

The engineer sent no answer to this letter, but on the 16th of June sent in to the ferry-works committee a document as follows: "I certify that Mr. G. Lawson has completed to my satisfaction the work which he contracted to execute at Seacombe Ferry for the Wallasey Local Board, and that he is therefore entitled to the sum of 500*l.*, being the balance of the sum of 5000*l.* mentioned in his contract, after deducting 4500*l.* already paid him on account; and I further certify that Mr. G. Lawson is entitled to the further sum of 565*l.* 19*s.* 2*d.* for extra work executed by him at Seacombe Ferry in connection with the said contract, being the balance of 1324*l.* 10*s.* after deducting 758*l.* 10*s.* 10*d.* paid by the Wallasey Local Board at his request for the hire of dredger, tug, hoppers, and insurance; and that such several balances of 500*l.* and 565*l.* 19*s.* 2*d.* are to be received by Mr. G. Lawson in full satisfaction of all his claims on the Wallasey Local Board for work executed by him at Seacombe pursuant to the contract and *in connection with it.* Dated 16th of June, 1880.

"W. Carson,

"Engineer to the Wallasey Local Board."

"Egremont, June 16th, 1880.

"To the Wallasey Local Board,

"I certify that the sum of 1065*l.* 19*s.* 2*d.* is due to Mr. G. Lawson, being the last instalment on account of contract, and extras, Seacombe Improvement Contract No. 8, as per particulars attached hereto:

"Previous disbursements	£4500	0	0
"This instalment	1065	19	2
"Paid by the board	758	10	10
	£6324	10	0

"W. Carson, Engineer."

The defendants' board sent a cheque to the plaintiff's solicitor in accordance with the above certificate. The plaintiff's solicitor wrote repudiating the certificate and announcing an action, and that he had placed the cheque to the defendant's credit as a further payment on account. The writ was issued on the 29th of October, 1880, claiming 2489*l.* 3*s.* 11*d.*, being the balance claimed on the 26th of May, minus the amount of the cheque. After the pleadings were closed, the parties stated this case in order to raise certain questions of law which were argued before my Brother Manisty and myself. It was admitted that none of the forms required by the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 174, were complied with, and that there was no consideration for any contract entered into or action taken by the defendant board, except as appears in the case, and that no document other than the original contract was under the seal of the board.

In the above circumstances, it was contended for the defendants,—1. That beyond the original contract for the excavation of 10,000 cubic yards there was no contract binding on the defendants; 2. That, if there was any such contract, it was only in respect of a matter *in connection with the original contract*, and therefore that any difference concerning it was matter for the decision of the engineer; 3. That the engineer had decided the only matters in difference by his certificate of the 16th of June, and that the plaintiff could have no right to recover beyond the amount certified by him.

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The plaintiff contended,—1. That there was an express contract binding upon the defendants to pay such amount as might be reasonable by way of compensation for the delay and expense incurred by him, and that such contract was entered into by the engineer on their behalf and with their knowledge, and in such a way as to bind them, looking at the nature of the claim and at the course of business adopted and the objects of the defendants' incorporation. He also contended that, if there was no express contract between the parties, there was an implied contract to be gathered from the very nature of the contract under seal, that the plaintiff should not be unreasonably delayed in his work and put to expense by the non-removal of the staging referred to in the contract; and that a claim for damages incurred by the plaintiff by reason of such unreasonable delay was not a difference *concerning the work contracted for, or concerning anything in connection with the original contract*, which must be referred to the engineer, and upon which his decision was to be final. It was further contended that, even if it was such a difference, there had been no such reference or decision as to be binding upon the plaintiff.

Upon full consideration of the facts above stated, we are of opinion that the plaintiff will be entitled to recover damages from the defendants if it should be established in evidence that the plaintiff was prevented from proceeding with the work owing to unreasonable delay in the removal of staging without the removal of which he could not proceed. We do not think that this liability arises from any contract made by the engineer on behalf of the defendants. The engineer had no authority to bind the defendants by any such contract. He merely had authority to extend the time for the performance of the contract (which he appears to have considered as done, though he had not extended it for any definite period), and to decide differences concerning the work contracted for or concerning anything in connection with the contract (not to make bargains on behalf of the defendants as to the amount to be paid for preventing the plaintiff from proceeding), and to certify for amounts due under the contract for contract work and extras. But we think that, looking at the terms of this contract, which provided for a definite amount of dredging to be done by a certain time, with power to the engineer to extend

that time as long as he should think reasonable in case of the non-removal of staging, there *is* an implied contract on the part of the defendants that the removal of the staging shall not be unreasonably delayed. We think this is the legitimate inference to be drawn from the case of *Roberts* v. *Bury Improvement Commissioners* (1), which was so fully discussed in the argument before us.

But it was contended that, if this be so, an action for damage caused by such unreasonable delay would be a difference *concerning a matter in connection with the contract*, and therefore a matter as to which the decision of the engineer was conclusive.

We think that there are two clear answers to this contention. First, we think that such a dispute is not "a difference concerning a thing connected with the contract." When the parties contracted, they never contemplated that the engineer would have to decide any such dispute. The dispute is one arising from a breach of an implied contract which is not part of or *necessarily* connected with *the* contract under seal. In order to bind a contractor to the certificate or decision of an architect or engineer appointed by the party for whom the work is done, there must be very conclusive language in the contract: *Roberts* v. *Bury Improvement Commissioners* (1). In the present case we fail to find any such language. But, secondly, we are of opinion that the correspondence set out in the case does not shew that the certificate of the engineer was a *decision* by which the plaintiff would be bound. He, no doubt, appears to have been under the impression that it might be important for him to obtain a certificate for this claim as well as for sums due under the contract: but we can find no evidence in the letters that he *agreed* to be bound by what the engineer might certify.

We therefore think that we ought to answer the fifth question in the affirmative, on the ground that the defendants would in the case supposed therein be liable on the ground that there was an implied agreement arising out of their contract with the plaintiff, that they would not be guilty of unreasonable delay in the removal of the staging, and so prevent him from proceeding with the work. And, in answer to the sixth question, we say that none

(1) Law Rep. 4 C. P. 755; 5 C. P. 310.

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of the documents set out in the case amount to an assessment of the expenses or damages binding on the plaintiff or defendants; but that the proper measure of such damages is what the plaintiff has unavoidably sustained in consequence of any such unreasonable delay.

The answers we have given to the fifth and sixth questions put to the Court render it unnecessary to answer categorically the other questions. But it may be as well shortly to state the view we entertain upon those questions. Our answer to the first is, that we do not think that the engineer entered into any *contract* on behalf of the board. We think that the documents set out merely amount to an expression of opinion on the part of the engineer that the defendants would be liable to pay damages such as those here sought to be recovered. We do not find any evidence that the board authorized the engineer to *agree* to pay such amounts as those claimed by the plaintiff.

To the second question we answer that there is no evidence in our opinion of a reference to the engineer of, or an award by him as to, the claims of the plaintiff, within the meaning of the arbitration clause referred to in the question.

To the third question, we think the plaintiff's claims in the action are not differences within the meaning of the arbitration clause, not being differences concerning the work contracted for, nor concerning anything in connection with the contract under seal, but differences concerning claims arising out of a breach of an implied, but independent, contract to do something essential to the commencement of the work by the contractor. Our answer to the fourth question is covered by that to the second question.

We think that, looking at the whole evidence in the case, there is nothing to shew any such reference, submission, or award.

Solicitors for plaintiff: *Radcliffes, Cator, & Martineau.*
Solicitors for defendants: *Simpson & North, Liverpool.*

J. S.

DAWE *v.* VERGARA.

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May 22.

Bankruptcy—Property devolving on Trustee—Goods of "trader" taken in Execution for Sum exceeding 50l.—Dissolution of Partnership—Appointment of Receiver.

E. and F. being in partnership as wine merchants, F. brought an action in the Chancery Division for a dissolution of the partnership, and an order was made by the Court for a dissolution, and the appointment of a receiver, under which a receiver took possession of the partnership effects and carried on the business, F. ceasing to take any part in the business, and having no other occupation than that of book-keeper to a trading company. An action having been commenced against E. and F. upon bills accepted by the firm before the receiver took possession, judgment was signed against F. and his separate property taken in execution for a sum exceeding 50*l.* :—

Held, that F. was not at the time of the execution a "trader" within the meaning of s. 87 of the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71.

SPECIAL case upon an interpleader order.

In April, 1880, John Ellery, of Plymouth, and A. M. Festing, entered into articles of partnership whereby they agreed to carry on business as wine and spirit merchants, under the firm of "John Ellery & Company," for the term of fourteen years. The business was carried on by the partners till the 28th of July, 1880, when Festing brought an action against Ellery in the Chancery Division of the High Court, claiming a dissolution, and on the 3rd of August, an order was made adjudging that the partnership should be dissolved as from the 28th of July, 1880, and that a receiver should be appointed to whom all stock in trade and other securities, books, &c., of the partnership should be delivered.

On the 18th of November, the plaintiff was under this order appointed receiver, and on the 8th of December took possession of all the effects of the partnership, and has since then continued in possession of them and has carried on the business formerly carried on by the partnership.

After the 8th of December, 1880, Festing wholly ceased to carry on the business of the partnership except in so far as the facts last stated may be held to amount to a trading by him, and since this date he has not been engaged in any other trade or business except that from November, 1881, to July, 1882, he was in the employment of a trading company as book-keeper, at a fixed salary.

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On the 5th of July, 1881, an action was commenced by the defendant against the firm of Ellery & Co., upon a bill of exchange accepted by the firm in March, 1880, for a debt incurred and due by the partnership, and upon a second bill accepted by Festing in the name of the firm for a debt incurred prior to the 28th of July, 1880. On the 21st of July, judgment was signed against Festing, Ellery not having been served with the writ, and on the 27th of July, the sheriff seized furniture, the separate property of Festing, at his private residence. On the 2nd of August, Festing filed a declaration of insolvency, and was on the next day adjudicated bankrupt. On the 7th of August, the sheriff, after notice of the adjudication, sold the furniture seized. The plaintiff having been appointed trustee under the bankruptcy, claimed the proceeds of the sale, and an interpleader was ordered. The question for the opinion of the Court was whether the plaintiff or the defendant was entitled to the proceeds of the sale.

Robson, for the plaintiff. The proceedings for the dissolution of the partnership and the appointment of the receiver did not put a stop to the business, and Festing at the time of the execution was still a trader within the meaning of the Bankruptcy Act, 1869, s. 87. It has been held that when a debt was contracted while the debtor was in trade, he could be adjudicated bankrupt upon it after he had ceased to carry on his business: *Ex parte Griffiths.* (1)

Cohen, Q.C. (*F. Thompson*, with him), for the defendant. Festing was not a "trader" within the Bankruptcy Act, 1869, s. 87, at the time of the seizure of his goods by the sheriff. The seizure was, therefore, before any act of bankruptcy, and the execution creditor is entitled to the goods as against the trustee: *Ex parte Rocke* (2); *Slater* v. *Pinder.* (3) Under s. 6, subs. 3, of the Act, which makes it an act of bankruptcy for a debtor, "being a trader," to depart from his dwelling-house, &c., it has been held that these words are to be construed in the same way as in subs. 6, and mean a trader at the time of the act of bankruptcy, and not

(1) 3 D. M. & G. 174. (2) Law Rep. 6 Ch. 795.
(3) Law Rep. 6 Ex. 228.

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when the debt was contracted: *Ex parte McGeorge, In re Stevens* (1). Festing ceased to trade after the appointment of the receiver, for it would have been a contempt of Court if he had interfered with the business. [He also cited *Ex parte Salaman, In re Taylor.* (2)]

POLLOCK, B. I am of opinion that our judgment must be for the defendant. The question for our decision is whether the plaintiff or the defendant is entitled to the proceeds of certain goods seized under an execution against one Festing. [The learned judge stated the facts.] There is no doubt that Festing was a trader up to the year 1880. In July of that year he brought an action in the Chancery Division claiming a dissolution of partnership. In August an order was made for a dissolution of the partnership, and that a receiver should be appointed to carry on the business. It is quite immaterial which of two partners commences proceedings such as these. The receiver, when appointed, is an officer of the Court, and neither of the partners can be sued upon any contract made with the receiver, and can have no power to accept any business in the partnership. The receiver took possession, and has carried on business in accordance with the order, and Festing has not gone into any other trade, but has been in the employment of a trading company as book-keeper. In the absence of anything to shew that Festing intended to reconstitute his business or to carry it on after the completion of the proceedings in Court, I think it is impossible for us to say that he was a trader at the time when his goods were taken in execution. The execution was not, therefore, such as is described in s. 7 of the Bankruptcy Act, 1869, and as against the trustee the execution creditor is entitled to the goods.

LOPES, J., concurred.

Judgment for the defendant.

Solicitors for plaintiff: *Hedges & Brandreth.*
Solicitors for defendant: *Simpson & Cullingford.*

(1) 20 Ch. D. 697. (2) 21 Ch. D. 394.

A. P. S.

1883
June 9.

HORSLEY *v.* PRICE AND ANOTHER.

Charterparty—Demurrage—Port of Unloading—"At all times of tide and always afloat."

A ship was chartered to unload at S. or "so near thereto as she may safely get at all times of tide and always afloat," and for delay in unloading the charterers were to pay demurrage.

The state of the tide prevented the ship from reaching S. for four days after she arrived at the nearest point where she was able to float:—

Held, that, according to the terms of the charterparty this was a sufficient arrival of the ship at S. to found a claim for demurrage.

THIS was a case adjourned for further consideration from the Gloucester Winter Assizes.

The question raised was whether the owner of a ship called the *Halo* could claim demurrage from the charterers of his ship for delay in unloading the ship, which was caused by the state of the tide preventing the ship from reaching Sharpness, the port where she was to be unloaded. The charterparty provided that she should proceed to the port of unloading, "or so near thereto as she may safely get at all times of tide and always afloat," and that demurrage should be paid if more than six days were occupied in discharging the cargo.

The plaintiff alleged that on the 5th of September, 1882, the ship arrived with the cargo on board at Kings Roads, being the nearest place to Sharpness, which she was then or prior to the 9th of September able to reach "at all times of tide and always afloat," and that she was then ready to discharge and deliver the cargo to the defendants.

To this the defendants replied that the plaintiff was not ready to deliver at Kings Roads, because there was a condition precedent to such discharge which the plaintiff had not fulfilled, viz., the entry of the ship in the port of Bristol; but the plaintiff contended that the defendants having declined to receive the cargo at Kings Roads they were released from this condition precedent.

The defendants pleaded that they discharged the cargo with all customary despatch and within six days of the ship's arrival and readiness to discharge cargo at the place of such discharge

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as required by the terms of the charterparty, and they denied that they were liable for any demurrage whatever.

Henry Matthews, Q.C., and *A. T. Lawrence*, for the plaintiff. The defendants cannot be heard to say that the ship was not entered at Bristol and so was not ready to discharge at Kings Roads, for they declined to receive the cargo there, and thus they exonerated the owners from the condition of entering the ship at Bristol: *Shield* v. *Wilkins* (1); *Parker* v. *Winlow* (2); *Jones* v. *Barkley*. (3)

Powell, Q.C., Anstie, Q.C., and *H. D. Greene*, for the defendants. The ship was bound to wait a reasonable time for unloading: *Bastifell* v. *Lloyd* (4); *Hayton* v. *Irwin* (5); *Hillston* v. *Gibson* (6); *Nelson* v. *Dahl*. (7) The ship did not come even to the port named as she was bound to do: *Schilizzi* v. *Derry* (8); *Metcalfe* v. *Britannia Ironworks* (9). The main intention of the parties was that the ship should go to Sharpness, all the rest of the charterparty is common form, and must not be too strictly construed. The shipowner should have lightened his vessel and so might have come to Sharpness: *Capper* v. *Wallace*. (10)

NORTH, J. The plaintiff is the owner of a steamship named the *Halo*, of 924 tons, and on the 26th of July, 1882, he chartered that vessel to the defendants through their agents. The charterparty provided that the vessel, which was then at Rouen, should proceed to Ljusne (Soderhamn), a Swedish port in the Baltic, or so near thereunto as she might safely get, and there load, always afloat, from the factors of the charterers a full cargo of deals and battens, and, being so loaded, should therewith proceed to Sharpness, "or so near thereto as she may safely get at all times of tide and always afloat," and deliver the same on payment of freight as therein provided. The only other material stipulations in the charterparty were that the cargo should be discharged with all dispatch,

(1) 5 Ex. 304.
(2) 7 E. & B. 942.
(3) 2 Doug. 684.
(4) 1 H. & C. 388.
(5) 5 C. P. D. 130.
(6) Cited in 5 P. D. 269; 8 Sess. Cas. 3rd Ser. 463.
(7) 12 Ch. D. 568; 6 App. Cas. 38.
(8) 4 E. & B. 873.
(9) 2 Q. B. D. 423.
(10) 5 Q. B. D. 163.

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as customary, or that demurrage was to be paid at the rate of 35*l.* per day; that the cargo was to be taken from alongside the vessel at the expense and risk of the charterers; and that the demurrage was to be payable if more than six days were occupied in discharging. On the 5th of September, 1882, the *Halo* arrived with her cargo at Kings Roads, an open roadstead in the Severn, opposite the mouth of the Avon, where ships can lie at anchor, but there is no wharf; it is within the port of Bristol. Sharpness is a place sixteen or eighteen miles higher up the Severn, and is not within the port of Bristol, but within the port of Gloucester. It is admitted that Kings Roads was the nearest place to Sharpness that the *Halo* could reach with her full cargo on board in the then state of the tides of the Severn at any time up to the 9th. In that state of things various communications took place between the persons acting for the ship and the charterers respectively, and the clear result of the evidence on this subject is, in my opinion, that the ship's agents alleged that the voyage was complete, and offered to deliver the cargo at Kings Roads, or, if the charterers would lighten the vessel by taking delivery of part there, to proceed to Sharpness with the remainder, and in either case to enter the ship at Bristol; but that the defendants' agents declined that offer, and refused to take delivery of any part of the cargo at Kings Roads, or to recognise the ship at all until she arrived at Sharpness. Under these circumstances the ship was not entered at Bristol, as such entry would have been useless. She remained at Kings Roads till the 9th, and on that day the tides just permitted her to go on to Sharpness "always afloat," and she arrived there that evening. On Monday, the 11th, she began the discharge of her cargo, which was completed on the 14th. This action is brought to recover 105*l.* for three days' demurrage upon the basis that the ship's voyage terminated, upon the true construction of the charterparty, on her arrival at Kings Roads on the 5th, that the six lay days expired on the 11th, and that demurrage is payable for the three subsequent days. This action is defended upon the footing that the voyage was not completed until the ship's arrival at Sharpness on the 9th, when the six lay days began to run, and that the cargo having been completely discharged within these six days, no demurrage is payable. A

subordinate point is raised by the pleadings that the plaintiff never was ready and willing to deliver the cargo at Kings Roads, inasmuch as no delivery could take place without the ship's being first entered at Bristol, which never was done; but as I find that the plaintiff did offer to make such entry if the defendants would accept delivery at Kings Roads, and the defendants refused to accept, this defence fails. To adopt the language of Lord Mansfield in *Jones* v. *Barclay* (1), "the party to perform must shew that he was ready; but if the other party stops him, on the ground of an intention not to perform his part, it is not necessary for the first to go further and do a nugatory act." The principal question in this case is when the voyage was terminated and the lay days began to run, and this depends upon the true construction of the charterparty, and particularly on the words "at all times of the tide." It appears from *Parker* v. *Winlow* (2), *Bastifell* v. *Lloyd* (3), and *Nelson* v. *Dahl* (4), that where the charterparty provides that a ship shall go to a harbour named, or as near thereto as she can safely get, the primary object is to get to the place named, and the alternative condition does not arise unless the cause which prevents the immediate arrival of the ship at the place named is such that it cannot be got rid of by the shipowner by reasonable means and within a reasonable time, having regard to the nature and the object of the voyage, and further, that if the cause of detention be the arrival of the vessel during the low tides, her having to wait for the tide to increase is one of the ordinary incidents of navigation, and the shipowner must submit to the delay so occasioned. No one would say that four days' waiting for such a purpose was not reasonable, and it was not disputed that if the words "at all times of the tide" had not been found in the charterparty, the plaintiff must have borne the risk of the delay at Kings Roads, the lay days would not have commenced till the 9th, and the defendants would have been entitled to judgment. What, then, do the words mean? The defendants cannot say that they have not practically any meaning at all. Their contention is that they are not to be read in connection with the previous words "so near thereto as she may

(1) 2 Doug. 684.
(2) 7 E. & B. 942.
(3) 1 H. & C. 388.
(4) 12 Ch. D. 568; 6 App. Cas. 38.

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safely get," but with the succeeding words "and always afloat," and that the whole sentence thus read means simply that the ship is, during the progress of the voyage and while lying at the port of discharge, to be afloat at all times of the tide—that is to say, always. There are several reasons why I cannot adopt this construction. The words in common use to provide for this purpose are "always afloat," or "lie always afloat," and I have no recollection of having ever myself seen a policy containing the words "at all times of the tide," though the words "so near thereto as she may safely get and lie afloat at all times of the tide" are found in the Scotch case of *Hillston* v. *Gibson* (1); but in that case the words "and always" are not found; in the present case the usual phrase "always afloat" is found, and I am asked in effect to treat the words "at all times of the tide" as surplusage, adding nothing to the meaning of the contract. This, in my opinion, I cannot do. They are not words of usual occurrence; they are, as pointed out by Baron Channell in *Bastifell* v. *Lloyd* (2), essentially words put in by the shipowner, and I must give them a meaning if possible. In the present case there is one reason, which appears to me absolutely conclusive, why I should not adopt the defendants' construction, which is this—the charterparty shews that the shipowner considered it quite as important that the vessel should be always afloat at the loading port as at the port of discharge. He provides for it in both places by the use of the words "always afloat;" but in speaking of the port of discharge the words "at all times of the tide" are added; and the only conclusion I can come to is that they are intentionally introduced there for the purpose of making provision for something not otherwise provided for, and in contemplation of some event possibly arising at the ship's destination not anticipated at the loading port. I do not forget Mr. Greene's argument that as the word "Sharpness" is written in the charterparty, and the words "or as near thereto as she may safely get" are printed, I must strike out the latter words and read the charterparty as providing for the port of arrival being Sharpness only. If this view was sustainable, I should have to do more, for I should have also to strike out the words "at all times of the tide and always

(1) 8 Sess. Cas. 3rd Series, 463, (2) 1 H. & C. 388.

afloat," and this certainly would simplify the construction of the document; but it is sufficient to say that I cannot strike out or reject any words, but must construe the document as it stands, and must give every portion of it some signification if possible. In my opinion the words "at all times of the tide" were put in on purpose to make the contract different from what it would have been if they had not been inserted; in other words, to relieve the shipowner from a burden which the law would have thrown upon him in the absence of these words, viz., the risk of delay upon arrival from the state of the tides in the river to which the charterer's convenience required the ship to go. It is obvious that every day's delay must be a considerable loss to the shipowner, and this charterparty seems to me expressly designed to relieve the owner at the charterer's expense from a chance of loss to the existence of which he was possibly awakened by the decision in *Nelson* v. *Dahl.* (1) The point which arose for decision in *Hillston* v. *Gibson* (2) and *Capper* v. *Wallace* (3), viz., whether and how far it was incumbent upon the shipowner to discharge part of the cargo at Kings Roads, and so, by lightening the vessel, enable her to proceed to Sharpness with the residue, does not arise here, for on the evidence I find that the plaintiff offered to adopt that course and the defendants declined to consent to it, pointing out that it would not be of any use. It was said that a construction of the charterparty which enables the shipowner to end the voyage at a point short of Sharpness, when by a short and reasonable delay he would have been able to carry his whole cargo to that destination, is a hard and unreasonable one. But if it appears to me, as it does, the only one which gives a proper signification to the words used by the parties, I cannot reform the contract upon any such ground as suggested, and, further, any argument founded upon hardship is open to this rejoinder—that it is the interest of the shipowner to act reasonably towards charterers, and in the present case the plaintiff actually did more than he was bound to do, and, for their accommodation and to save them expense, did wait at Kings Roads, and ultimately proceeded to Sharpness, and in my opinion he is only

(1) 12 Ch. D. 568; 6 App. Cas. 38.
(2) Cited in 5 P. D. 260; 8 Sess. Cas. 3rd Ser. 463.
(3) 5 Q. B. D. 163.

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acting reasonably in claiming payment as agreed for the time so lost to him. This seems to me a far more appropriate and reasonable course for the shipowner to adopt than that which Mr. Anstie says was his only proper one, viz., to have himself discharged the cargo at Kings Roads at the end of the lay days and warehoused at Bristol, leaving the charterers to get it as they could, and then to have sued the charterers for damages from their refusal to take delivery at Kings Roads. It was also argued by Mr. Anstie that the decisions in *Schilizzi* v. *Derry* (1) and *Metcalfe* v. *Britannia Ironworks* (2) shews that the words "as near thereunto as she can safely get" must be construed to mean a point within the ambit of the port named, as near to the port itself as she can safely get. It is not for me to say, after those decisions, that such a construction would be adding words to the charterparty not found there, but to make those cases analogous at all to this present I certainly should have to add words to those charterparties which were not found there, viz., some such words as "in all states of the river" in the first case and "at all seasons of the year" in the second. In the present case I cannot accede to the contention so urged; if I were to read the words "to Sharpness, or as near thereunto, within the ambit of that port" (or "the port of Gloucester" if you will) "as she could safely get at all times of the tide and always afloat," I should be reading the charterparty ut magis pereat quam valeat; for it is not suggested that any such place exists, or that the ship ought to have gone, or could have gone, to any point above Kings Roads short of Sharpness itself; and therefore what I am asked to do is to exclude from this charterparty all the qualifying words following the word "*Sharpness*," and this I cannot do. I may add that in the case of *The Alhambra* (3) the contention that the words "within the ambit of the port" were to be read into a charterparty providing that a ship should go to a port "or as near thereto as she could safely get," does not seem to have occurred to the Judges of the Court of Appeal or to the experienced counsel who argued that case. I think I have now noticed all the arguments addressed to me on behalf of the defendants except one, founded on the case of *Hayton* v. *Irwin* (4),

(1) 4 E. & B. 873. 15 Jur 46. 795.
(2) 1 Q. B. D. 613; 2 Q. B. D. 423.
(3) 6 P. D. 68.
(4) 5 C. P. D. 130.

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and I am obliged to pass that over without comment, because, probably from my own fault, I was quite unable to follow it or see its application to the present case. Since this case was argued I have seen in *The Times* a report of a somewhat similar case before my brother Cave, where the words "if sufficient water" were introduced in collocation with a named dock, and am glad to see that his views were much the same as those to which I have come. Under these circumstances, there will be judgment for the plaintiff for 105*l.*, and the costs will follow the event.

Judgment for the plaintiff.

Solicitors for plaintiff: *Turnbull, Lilly, & Musir.*
Solicitors for defendants: *Harvey, Oliver, & Capron.*

C. W. C.

INGRAM *v.* LITTLE.

June 25.

Practice—Interrogatories—Answer—Guardian ad litem:—"Party" to Action—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), s. 100—*Order XVIII.—Order XXXI., rule* 1.

A guardian ad litém is not a party to the action within the meaning of Order XXXI., rule 1, and therefore cannot be compelled to answer interrogatories.

MOTION by way of appeal from a decision of Huddleston, B., at chambers.

Interrogatories having been administered by the plaintiff in the action to the defendant, an affidavit was filed by the defendant's son, stating that he had been appointed by an order of the Court guardian ad litem to the defendant, who was of unsound mind, for the purpose of conducting the defence, and submitting on behalf of the defendant that he was not obliged to answer any of the interrogatories.

Huddleston, B., at chambers having refused to order the guardian to make any further answer, the plaintiff appealed.

Nicholl, for the plaintiff. By Order XXXI., rule 1, the plaintiff or defendant in an action may administer interrogatories to the opposite party, and by s. 100 of the Judicature Act, 1873,

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"'party' shall include every person served with notice of or attending any proceeding though not named in the record." A guardian ad litem is therefore a "party" within Order XXXI., rule 1. In *Higginson* v. *Hall* (1), Malins, V.C., ordered an affidavit of documents to be made by the next friend of a plaintiff who was of unsound mind, clearly treating the next friend as a "party" to the action, within the meaning of Order XXXI., rule 12. In the present case the guardian has administered interrogatories on behalf of the defendant to the plaintiff.

K. Digby, for the defendant. Order XVIII. deals specially with actions against lunatics and persons of unsound mind not so found by inquisition by providing that the practice in Chancery before the Judicature Acts shall apply. Before the Judicature Acts a guardian ad litem could not in a Chancery suit be compelled to take an oath; nor could his answer be read against the lunatic. In all the cases the guardian is treated not as the agent of the lunatic, but as an officer appointed by the Court, and as a party to the suit only for the purpose of protecting the lunatic's interest, with no authority to make admissions: *Wilds* v. *Davis* (2); *Freeman* v. *Grady* (3); *Wrottesley* v. *Bendish* (4); *Carew* v. *Johnstone* (5); *Hardwick* v. *Wright*. (6)

[DENMAN, J., referred to *In re Corsellis*; *Lawton* v. *Elwes*. (7)]

That case is a direct authority that a guardian ad litem is not a party within the meaning of Order XXXI.: *Higginson* v. *Hall* (8), is different from the present case; the application there was for discovery of documents against the guardian, and discovery was only obtained by the indirect way of staying proceedings until it was given.

Nicholl, replied.

LORD COLERIDGE, C.J. I am of opinion that the defendant is entitled to succeed in this case. I think, upon the true construction of the Judicature Acts and rules, guardians ad litem are relieved from the duty of answering interrogatories, and I rest my decision on Order XVIII. The orders and rules made under

(1) 10 Ch. D. 235.
(2) 4 Jur. 715.
(3) 8 Ir. Eq. 137.
(4) 3 P. Wms. 238.
(5) 2 Sch. & Lef. 280.
(6) 11 Jur. (N.S.) 297.
(7) 52 L. J. (Ch.) 399.
(8) 10 Ch. D. 235.

the Judicature Acts have the same force and effect as the Acts themselves. The definition of "party" in s. 100 of the Judicature Act, 1873, is sufficiently wide in its terms to include guardians "ad litem," and the words defined by that section are to have the meaning therein assigned to them unless there is anything repugnant in the context. By Order XXXI., rule 1, interrogatories may be administered by the plaintiff or defendant to the opposite "party" in the action. It is reasonable therefore to say that guardians ad litem are included by that rule unless provisions shewing a contrary intention are found in the rules. But it seems to me that such provisions are found in Order XVIII. I think it was intended by that order to incorporate the practice with respect to guardians ad litem which, prior to the Judicature Acts, prevailed in the Court of Chancery.

Now it appears to have been the practice in Chancery not to allow the answer of a guardian ad litem to be read in a suit against a lunatic or person of unsound mind not so found by inquisition. Daniell's Chancery Practice, 5th ed., vol. i. p. 161, where the learned author refers to *Leving* v. *Calverley* (1), which is the only authority against the practice, and states his opinion that modern decisions would not support the proposition that the answer of the guardian could be read. The cases cited in the argument for the defendant seem to have been decided in favour of infant lunatics and persons of unsound mind, upon the ground that the guardian ad litem is a party to the action only for the purpose of protecting the interest of the infant or lunatic, and for no purpose damaging to that interest. It would seem that he is relieved from all liability as a party to the action where in acting as such he would be acting adversely to the interest of the infant or lunatic. I therefore am of opinion that the guardian is not a party within the meaning of Order XXXI., rule 1. I should have come to this conclusion before the decision in *In re Corsellis; Lawton* v. *Elwes* (2), which I think is directly in point. In that case it was held that the next friend of an infant plaintiff was not a party to the action within rule 12 of Order XXXI. It is satisfactory to find that there is a decision of the eminent equity judge who decided that case in favour of the view I have expressed.

(1) Prec. Ch. 229. (2) 52 L. J. (Ch.) 399.

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Upon principle and authority, therefore, I am of opinion that the defendant is entitled to succeed, and that he cannot be compelled to answer the interrogatories.

DENMAN, J. I am of the same opinion. The right of the plaintiff or defendant in an action to administer interrogatories rests upon Order XXXI., rule 1. It certainly occurred to my mind at first that the rule might apply to guardians ad litem, having regard to the definition of party in s. 100 of the Act of 1873, which section, it may be observed, does not seem to have been referred to in *In re Corsellis; Lawton* v. *Elwes*. (1) But I entirely agree with the Lord Chief Justice in thinking that this case must be decided upon Order XVIII., which expressly refers to lunatics and persons of unsound mind not so found by inquisition, and provides that they may sue and defend actions by their committees and guardians in manner practised in the Court of Chancery before the passing of the Judicature Acts. It seems clear that before the passing of the Acts guardians ad litem could not be called upon to make admissions against the interest of those on whose behalf they were appointed. The main object of administering interrogatories is to save expense by obtaining admissions from the opposite party, and I do not think the legislature intended by the Judicature Acts and rules to give any greater power of obtaining admissions from guardians ad litem than existed before the passing of those Acts. I am of opinion that the decision of the judge at chambers was right, and that this appeal fails.

MANISTY, J. I am of the same opinion for the reasons given by the Lord Chief Justice and my brother Denman. If there had been no authority on the question I should have been prepared to come to the same conclusion upon principle. The guardian ad litem of a person of unsound mind has one duty to perform, namely, to protect the interest of the person on whose behalf he is appointed. The guardian is performing that duty when, as was done here, he interrogates the opposite party. It would in my view be a monstrous result if a person appointed solely to protect the interests of a lunatic were allowed to make

(1) 52 L. J. (Ch.) 399.

admissions against him. The plaintiff who sues a lunatic may apply to have a guardian ad litem appointed, and it would be a singular consequence if the person appointed upon the application of the plaintiff could make admissions which could be given in evidence against the lunatic defendant.

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Motion refused.

Solicitors for plaintiff: *Joel Emmanuel & Co.*

Solicitors for defendant: *Paterson, Snow, & Bloxam, for Peake, Snow, & Peake, Sleaford.*

W. A.

JOLIFFE *v.* BAKER.

June 26.

False Representation, Action for, Moral Fraud essential to—Sale of Land—Compensation for Misdescription, Claim of, after Completion.

In an action for damages for a misrepresentation with reference to the subject-matter of a contract, in the absence of any breach of contract or warranty, fraud is an essential element of the cause of action.

There is no such thing as "legal" fraud in the absence of moral fraud.

A vendor of real property, during the negotiations for the sale, made a representation to the purchaser, bonâ fide, and believing it to be true, that the pieces of land sold contained three acres, whereas in truth they contained a less quantity. After completion of the contract and execution of the conveyance, the purchaser sought to recover compensation from the vendor for the false representation:—

Held, that, after completion, such compensation could not be recovered unless there had been fraud or the breach of some contract or warranty contained in the conveyance, and, therefore, the action would not lie.

APPEAL from the decision of the county court judge of Hampshire. The facts and arguments sufficiently appear from the judgments.

June 4, 5. *Macaskie*, for the appellant, the defendant in the action.

Harris Lea, for the respondent, the plaintiff.

The following authorities were cited in addition to those referred to in the judgment: *Brett* v. *Clowser* (1); *Brownlie* v. *Campbell* (2); *Phelps* v. *White*. (3)

Cur. adv. vult.

(1) 5 C. P. D. 376. (2) 5 App. Cas. 925.

(3) Ir. L. R. 5 Ch. D. 318.

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JOLIFFE v. BAKER.

June 26. The judgment of Watkin Williams and Cave, JJ., was delivered by

WATKIN WILLIAMS, J. This is an appeal by the defendant against a decision of the County Court of Hampshire, which was argued before my brothers Cave and A. L. Smith and myself during the present sittings.

The question arises between vendor and purchaser of real property; the plaintiff, the purchaser, seeking to recover compensation from the defendant, the vendor, after the completion of the contract, on account of an alleged mis-statement as to the acreage of the property made in the contract of sale and repeated in the conveyance, but made in good faith and without any intention to deceive.

The appeal comes before us upon a special case stated by the judge, from which the facts appear to be as follows:—

In June, 1881, the defendant advertised the property in question for sale, and in reply to a letter of inquiry from the plaintiff thus described it in a letter of the 1st of July, 1881:

"The property is situate at Stroud Wood, it consists of cottage thatched, with four rooms, pigstye, cowpen, garden, and capital meadow, *in all three acres*; it has been occupied by Charles Lee for the past thirty years, and the rental is 16*l.* a year—price 275*l.*"

The plaintiff went and looked at the property, but it was never measured, and on the 28th of July, 1881, a contract in writing was entered into between the parties for the purchase at 270*l.*; in this contract the property was described as—"All that freehold cottage or tenement, garden and land, *containing by estimation three acres or thereabouts.*"

There were provisions for delivery of abstract of title and making requisitions and objections, as follows:—"The purchaser shall make his objections and requisitions (if any) in respect of the title and all matters appearing upon the abstract or these presents, and send the same within fourteen days from the day of the delivery of the abstract, and in default of such objections and requisitions, and subject to such, shall be deemed to have accepted the title and to have waived all other objections and requisitions, and if he shall insist on any objection

which the vendor shall be unable or unwilling to remove or comply with, the vendor may, by notice in writing to be given to the purchaser, at any time, and notwithstanding any negotiation or litigation in respect of such objection, annul the sale, and the purchaser shall have no claim on the vendor for the expense of investigating the title or other expenses whatsoever, or for compensation."

The purchase was completed and the conveyance executed on the 25th of August, 1881, and the purchase-money was paid and possession taken on the same day. In the conveyance the property was described as "All that cottage or tenement and piece or parcel of meadow land to the same adjoining, containing by estimation one-and-a-half acres more or less, bounded on lands now or late of Dame Jane St. John Mildmay on the north part, and upon Stroud Wood on the east, south, and west, and also all that piece or parcel of land, containing by estimation one-and-a-half acres more or less, sometime since purchased of the (inclosure) commissioners adjoining to and now thrown with the said piece of meadow land."

The defendant had purchased the property in 1879 by the same description in every respect; he had never measured the land, and believed that the description as to acreage was correct, and he sold the property to the plaintiff in good faith, honestly believing the estimate to be correct.

In December, 1881, the plaintiff, in consequence of statements that had been made to him, measured the land and found that it contained 2*a*. 1*r*. 12*p*. instead of about three acres, and he applied to the defendant for compensation: the defendant refused to make compensation, and this action was brought to recover it.

The county court judge found that there was no fraud or deceit on the part of the defendant, but decided that, notwithstanding there was no fraud, yet, as the actual quantity of land did not sufficiently answer the description in the contract and conveyance, the plaintiff was entitled to recover for the deficiency in quantity, and gave judgment for the plaintiff for 50*l*.

From this decision the defendant has appealed, and we have to determine whether it is correct.

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Before considering the legal questions involved in the case, I will turn again for one moment to the facts. The land, the subject-matter of the sale, consisted of specific parcels defined by metes and bounds, and there was no mistake or error as to the extent of the parcels of land sold, which were seen and examined by the purchaser before the sale; the purchase-money was an entire lump sum for the lot; the vendor undoubtedly represented the property in the treaty for the sale as being in all three acres, and in the formal contract and in the conveyance itself it is described as "containing by estimation three acres or thereabouts."

It was stated that the county court judge, in the decision at which he arrived, acted upon and followed the undoubtedly high authority of two opinions recently expressed by Fry, L.J., in *Hart* v. *Swaine* (1) and Sir George Jessel in *In re Turner and Skelton* (2), which were said to have laid down the proposition broadly that a purchaser, even after completion and after conveyance, and in the absence of actual fraud, was entitled to claim compensation for errors and inaccuracies in the particulars of the land sold, and it was strenuously argued before us that, although the county court judge had negatived actual moral fraud, yet that the case was one coming within the principle of legal fraud entitling the purchaser to relief even after conveyance.

In direct opposition to these there were cited three decisions of Malins, V.C., in the last of which he distinctly disputed the correctness of Sir George Jessel's decision, and declined to follow it, and it is in this conflict of the most recent authorities that we have to determine the question.

I propose at once to examine the conflicting authorities that have been cited to us. The first in order of date is *Hart* v. *Swaine* (1), decided in 1877 by the present Lord Justice Fry. It was an action by the purchaser against the vendor of real estate to set aside, after conveyance, the sale of a piece of land sold as freehold which afterwards was discovered to be copyhold. The defendant sold the land in question, about four acres, to the plaintiff in February, 1876, and conveyed it to him as freehold. It appeared that the defendant had bought the land, together

(1) 7 Ch. D. 42. (2) 13 Ch. D. 130.

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with other land, in 1871 from one Chamberlain, who informed him that a portion of the land he was selling was copyhold. In fact the copyhold portion had been an allotment under an Inclosure Act in respect of other copyhold land the property of the Chamberlains, and there was nothing in the abstract of title shewing that any of the land offered for sale was copyhold, and the defendant for his own convenience took a conveyance of the whole from Chamberlain as freehold. It appeared also that early in 1876, and before the defendant sold to the plaintiff, the defendant had put up the four acres for sale by public auction, and on that occasion a Mr. Smith publicly stated in the auction room that the land was copyhold and not freehold, and no sale was then effected. From this statement I collect that the defendant had then proposed to sell the property as freehold when Mr. Smith stated that it was copyhold, and that he afterwards, within a month, sold the property to the plaintiff, asserting it to be and selling it as freehold. Fry, L.J., set aside the sale and ordered the defendant to repay the purchase-money with interest and expenses. This decision, if I may say so without appearing impertinent, is equally consistent with sound law as with sound sense, but the reasoning upon which it is founded is, if I may say so without presumption, unsatisfactory, and has proved misleading. At the conclusion of the case Fry, L.J., said: "I see no evidence of actual fraud on the part of the defendant; he has only made a mistake. But as he has taken upon himself to assert that the land is freehold, am I at liberty to look into the state of his mind?" And further on he says: "The defendant took upon himself to assert that to be true which has turned out to be false, and he made this assertion for the purpose of benefiting himself. Though he may have done this believing it to be true, the result appears to me to be that which is expressed in the judgment of Maule, J., in *Evans* v. *Edmonds* (1), where he says, 'I conceive if a man having no knowledge whatever of the subject takes upon himself to represent a certain state of facts to exist, he does so at his peril, and if it be done either with a view to secure some benefit to himself or to deceive a third person he is in law guilty of a fraud, for he takes upon himself to warrant his own belief of the

(1) 13 C. B. 777.

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truth of that which he so asserts. Although the person making the representation may have no knowledge of its falsehood, the representation may still have been fraudulently made,' that is to say," continues Fry, L.J., "the defendant having taken upon himself, with a view to securing a benefit to himself, to assert that the property was freehold, has in the view of a court of law committed a fraud." Having further cited the case of *Rawlins* v. *Wickham* (1), he concluded by saying, "It appears to me, therefore, that in this case there has been a legal fraud committed by the defendant, and that I am bound by the authorities to give the plaintiffs the relief they ask."

In the first place, it seems, looking to the facts of *Hart* v. *Swaine* (2), that it can scarcely be cited as an authority in support of the doctrine that the so-called *legal fraud* without actual moral fraud is a sufficient ground for setting aside a conveyance. There was in that case ample evidence of fraud in the common meaning of the term. The defendant, even if he did not know his statement to be false, could not possibly have known it to be true in the sense that, secundum subjectam materiem, the plaintiff had a right to suppose from his statements that he did know it: and it is certainly unfortunate that the language of Maule, J., in *Evans* v. *Edmonds* (3), should have been cited as an authority for the proposition that there can be an actionable legal fraud in the absence of moral fraud, because *Evans* v. *Edmonds* (3) was a case of the most flagrant fraud and treachery to be found in our books. In that case the plaintiff, as trustee under a separation deed between the defendant and his wife, sued for arrears of an annuity which the defendant had covenanted to pay. The defendant, in a plea very inartificially drawn, pleaded that he was induced to enter into the deed by false and fraudulent misrepresentation of the plaintiff, to the effect that the wife was a chaste person and that he the plaintiff was a virtuous person, and fit to be trustee, whereas the plaintiff had treacherously and perfidiously seduced the wife and concealed the fact from the defendant, and fraudulently induced the defendant to enter into the separation deed in order that he might seduce away the wife

(1) 3 De G. & J. 316. (2) 7 Ch. D. 42.
(3) 13 C. B. 777.

and keep up his adulterous intercourse with her. At the trial the jury found the plea to be true, and gave their verdict for the defendant. The plaintiff then moved for judgment non obstante veredicto, upon the ground that the plea was bad, having omitted the necessary averment of the plaintiff's knowledge at the time of making the representation that the wife was unchaste. The only point was whether the omission of this technical averment was cured and supplemented by the verdict, inasmuch as actual fraud in fact was necessarily involved in the finding of the jury. The objection after verdict was obviously frivolous and absurd, and the observations of Maule, J., in answering it were conceived in a vein of the keenest irony and satire when he said that a person might make such a representation fraudulently, as the jury had found, consistently with his not knowing it at the time to be false, which was not averred.

Nor is the other case cited by Fry, L.J., namely, *Rawlins* v. *Wickham* (1), any better authority for this doctrine of legal as distinguished from moral fraud. In that case the plaintiff had entered into partnership with two persons named Bailey and Wickham as bankers, and paid 2300*l.* for his share upon the faith of a statement of accounts and balance sheet handed to him by both of them shewing the bank to be in a solvent condition; the plaintiff, discovering afterwards that the accounts and balance sheet were false, brought an action at law against them both for damages for false and fraudulent misrepresentation. During the pendency of this action Wickham died. The plaintiff proceeded with his action against Bailey and recovered damages amounting to about 12,000*l.*; failing to obtain satisfaction from Bailey, he filed his bill against Wickham's executors and Bailey for a dissolution of the partnership, and claimed a return of his 2300*l.* and an indemnity. There was strong ground for believing that Wickham had no knowledge that the accounts were false, and this was urged as a ground why his estate should not be made responsible; a decree however was made dissolving the partnership, and directing the money to be repaid out of Wickham's estate, Turner, L.J., saying, "A representation was made by Wickham of a fact of the truth or falsehood of which

(1) 3 De G. & J. 316.

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he knew nothing. It has turned out that this representation was contrary to the fact. There was not, as I think, any moral fraud, but there was legal fraud, and the result is that the estate of Mr. Wickham must answer for the fraud." Whatever may have been the language of the judgment, I venture with great deference to say that that decision rests, and may be supported, upon the sound broad foundation of the well-known principle of law that every partner undertakes and engages for the fidelity of his co-partners in the execution of matters within the scope of the authority conferred upon them; and all that could be decided in that case was that Wickham, even though an innocent partner, could not escape from the consequences of the fraudulent misrepresentation of his partner in a transaction which he had authorized him to carry out, and there was no necessity to resort to any doctrine of fraud.

The next in order of the alleged conflicting authorities were two decisions of Malins, V.C., in which he decided that in the absence of fraud a purchaser cannot obtain compensation after conveyance for misrepresentation, even though such misrepresentation related to the subject-matter of the conveyance.

The first of these cases was *Manson* v. *Thacker*. (1) It was an application by a purchaser of real property, known as Norway Wharf, for compensation in respect of an underground culvert not disclosed by the particulars of sale, wherein the property was described as "available" as a building site for a warehouse, and by the 16th condition of which it was provided, "that if any error or mis-statement should appear to have been made in the particulars such error or mis-statement was not to annul the sale or to entitle the purchaser to be discharged from his purchase, but compensation was to be made to or by the purchaser as the case might be, and the amount was to be settled by a judge at chambers." The contract was completed and conveyance executed in February, 1877, and in July following the purchaser discovered a culvert running underneath the land, and that he had no right to interfere with it. The mouth of the culvert was visible at low water. The Vice-Chancellor, assuming that the purchaser would have been entitled to compensation if he had

(1) 7 Ch. D. 620.

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come before completion, held that, after the conveyance had been executed and the purchase-money paid and possession taken, he was not entitled to claim compensation. He declined to follow the case of *Bos* v. *Helsham* (1), which I shall refer to hereafter, where the Court of Exchequer held that such a clause entitled the purchaser to compensation after the completion of the purchase, and he considered that in *Hart* v. *Swaine* (2), the whole transaction was vitiated by what he called legal fraud, by which, however, I understand him to have meant that which would have been treated as a fraud even in a court of law.

The second case was *Besley* v. *Besley*. (3) That was an action for the administration of the estate of one Besley, a typefounder, and a claim was made upon the estate under the following circumstances:—In 1861 Besley sold his business to the claimants for 10,000*l*., and, amongst other things, it was agreed that Besley should grant them an underlease of the premises for the residue of the term for which he held the same, except the last ten days, at 225*l*. a year; the purchase was completed, and by an underlease prepared by Besley's solicitor the premises were demised for twenty-three years less ten days. It was afterwards discovered that the term had only sixteen years to run instead of twenty-three, and that Besley had consequently granted the lease for seven years longer than he had power to do, and the claimants were obliged at the end of the sixteen years to pay a rent of 400*l*. a year. It was admitted that this was done by mistake. The Vice-Chancellor decided that the claim was inadmissible, stating that a purchaser must be wise in time and is bound to look into the facts connected with the subject-matter of his purchase before the completion of the contract, and that after the execution of the conveyance, in the absence of fraud, he comes too late.

I next come to the undoubtedly great authority of Sir George Jessel on the other side, in the case of *In re Turner & Skelton* (4), which was an application under the Vendors and Purchasers Act, 1874, on the part of a purchaser seeking compensation from the vendor for an error as to the quantity of the land, not discovered

(1) Law Rep. 2 Ex. 72.
(2) 7 Ch. D. 42.
(3) 9 Ch. D. 103.
(4) 13 Ch. D. 130.

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until after the conveyance had been executed. The facts were these: By the contract the vendors agreed to sell and the purchaser to buy a piece of land described in a schedule as containing 6*a.* 2*r.* 10*p.* or thereabouts, for 500*l.*, and by the conditions of sale it was provided that if any error or mis-statement should be found in the schedule it should not annul the sale, but compensation should be made in respect thereof. After the completion of the purchase and execution of the conveyance the purchaser discovered, by measurement of the piece of land, that it only contained 5*a.* 0*r.* 7*p.* Sir George Jessel, in deciding in favour of the claim, said: "I will first consider what the law is where there is no special contract between vendor and purchaser as to compensation. There are cases in which a purchaser may lose his right to compensation by doing certain acts which shew an intention on his part to fulfil the contract and to waive any claim in respect of misdescription of the property;" and he cites a passage from Dart's Vendors and Purchasers stating that a purchaser may lose his right to resist specific performance, and his right to compensation by certain conduct on his part, and proceeds: "No book can be produced to shew that it was thought to be settled law that a purchaser loses his right to compensation by taking a conveyance, and on what principle should he do so? The theory is, that he has contracted to take compensation if there is any variation from the particulars. Why then should he lose it by taking a conveyance? The only reason that can be alleged is that everything is supposed to be settled between the parties, but why should that be an obstacle to the right of the purchaser when the defect is discovered afterwards? . . . As to the authorities, they are all, with one exception (*Manson* v. *Thacker* (1)), the other way." And he cites *Cann* v. *Cann* (2), which he says was not distinguishable from the case before him, and *Bos* v. *Helsham* (3), in which the Court of Exchequer decided in the same way, and he proceeds to say: "With these authorities one would think that the law was settled, but Malins, V.C., has, in *Manson* v. *Thacker* (1), decided the other way. . . . Considering *Cann* v. *Cann* (2) and *Bos* v. *Helsham* (3), I should consider myself bound by authority,

(1) 7 Ch. D. 620. (2) 3 Sim. 447.
(3) Law Rep. 2 Ex. 72.

and I cannot imagine that Malins, V.C., intended to overrule the previous cases."

In the still more recent case of *Allen* v. *Richardson* (1) the same question again arose before Malins, V.C., and that learned judge, who was himself a very experienced conveyancer and learned real property lawyer, in adhering to his former opinion, said: "I can only say that I very much regret that I am obliged to take an entirely different view from that of a judge who is entitled to so much respect as the Master of the Rolls. All I can say is, that I retain strongly my former opinion, and upon that opinion I shall act until it is overruled. Until I find it laid down by the Court of Appeal that a purchaser is to be allowed to be lax in the conduct of his business, that he is to be allowed to lie by carelessly and discover things after the completion of the purchase which he ought to have discovered before, I shall adhere to my own view, because I believe that such a rule would be detrimental to the best interests of persons possessed of property. . . . I entirely dissent from all that the Master of the Rolls appears to have said."

In order to test the correctness of these propositions of Sir George Jessel, I turn to the two authorities that he cites, and to the standard works of Mr. Dart and Lord St. Leonards upon vendors and purchasers.

In *Cann* v. *Cann* (2) the question arose in an administration suit. Certain premises had been put up for sale by auction under an order of the Court. The premises were represented by the vendors in the particulars as being then in the occupation of tenants at a rent of 55*l.* a year. One of the conditions of sale provided that, if there should appear any error or mistake whatever respecting the estate, it should not annul the sale, but a compensation should be given. Upon the faith of the representation as to the rent, one Phipson became the purchaser, the purchase-money was paid to the credit of the cause, and the estate was conveyed to Phipson. After he was let into possession he discovered that the representation as to the rent was false, as the rent was only 40*l.* a year; he then presented a petition in the cause praying for compensation out of the fund in Court. Now

(1) 13 Ch. D. 524.

(2) 3 Sim. 447.

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here was a case in which, in the first place, there was a special contract for compensation between the parties, and secondly, there was a distinct and most material false representation and actionable fraud by the vendor, and, thirdly, the petition was presented in relation to a purchase carried out under the order of the Court in an administration suit, the proceeds of the sale being still in the hands of the Court. Shadwell, V.C., said: "The question is whether, there having been a misrepresentation in respect to which the purchaser had a right of action, the circumstance of his having taken a conveyance has destroyed that right. The right of the petitioner is not at all affected by that circumstance, and, as the Court would not have permitted him to bring an action for damages on account of the misrepresentation, I am of opinion he is entitled to be recouped out of the purchase-money."

Bos v. *Helsham* (1) was an action at law for compensation under a contract of sale containing the clause that, if any error whatever should appear in the particulars of sale, it should not annul the sale, but in such case a reasonable compensation should be given. The defendants pleaded on equitable grounds that they had by deed conveyed the property according to the contract to the plaintiff, who accepted the conveyance and paid the purchase-money, and the purchase was then finally completed, and that after the completion the plaintiff discovered, and then for the first time gave notice of the alleged error. To this there was a demurrer. Kelly, C.B., and the Court of Exchequer gave judgment for the plaintiff upon the ground that by the terms of the special contract the defendant had agreed to make compensation for any errors in the particulars, and that there was no limitation of this to errors discovered before completion, and Channell, B., bases his judgment solely upon the interpretation of the express contract between the parties, considering that it was wholly beside the question to consider what would have been the rights of the parties in equity, apart from express agreement. The attention of the learned judges in that case does not appear to have been directed to the point that the compensation clause in such contracts is introduced into the conditions of sale for the benefit of the vendors, and to protect them against what would otherwise

(1) Law Rep. 2 Ex. 72.

have been the right of the purchaser in equity to resist specific performance of the contract on the ground of inconsiderable errors and inaccuracies in the particulars: see *Whittemore* v. *Whittemore*. (1) Nor was their attention called to the point that so far as such conditions form part of any contract, they are entirely merged in and superseded by the formal deed of conveyance.

In Dart's Vendors and Purchasers, ch. 14, s. 5, the rule is thus laid down: "With some few special exceptions a purchaser, after the conveyance is executed by all necessary parties, has no remedy at law or in equity in respect of defects either in the title to or quantity or quality of the estate which are not covered by the vendor's covenants." And in s. 6 he enumerates the special exceptions in which there is a remedy after conveyance, and these are all cases either of actual falsehood and fraud on the part of the vendor entitling the purchaser to a rescission of the contract, or where there is a total absence of the subject-matter of the intended contract, and he expressly says that a "bill filed after conveyance simply for compensation in respect of defects will be dismissed," and Lord St. Leonards' book is to the same effect. This is how the modern authorities stand, and I own that, if it had not been for the opinions attributed to Sir George Jessel and Fry, L.J., in the cases referred to, I should have thought the rules applicable to the case tolerably clear. After the best consideration that I am able to give to these conflicting authorities, I am of opinion, in the first place, that it has been the established practice of the Court of Chancery that a bill for compensation properly so-called, the purchaser retaining the property, could not be entertained after the completion of the contract and execution of the conveyance, and that the jurisdiction under which compensation was granted was exercised only as ancillary to specific performance, and was never exercised independently. The evidence of this is principally negative, but it was distinctly recognised and stated in the case of *Newham* v. *May* (2); in that case the purchaser of freehold houses filed his bill after conveyance praying for compensation for the difference in value of the property by reason of the amount of rent having been misrepresented by the vendor. The bill was dismissed, Alexander, C.B.,

(1) Law Rep. 8 Eq. 603.

(2) 13 Price, 749.

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stating it as his opinion that the remedy in such cases was by action at law for damages, and that the jurisdiction of equity in cases of compensation had grown up only as ancillary to and incidentally necessary to effectuate decrees of specific performance of contracts for the sale of real property.

A similar opinion was expressed by Lord Eldon in *Todd* v. *Gee* (1), in which he followed the course of earlier authorities: see *Gwillim* v. *Stone* (2) and *Blore* v. *Sutton*. (3) This rule seems to me also to rest upon sound principles of law and equity, because if it were otherwise a purchaser might after conveyance, and while still insisting upon retaining the estate, ask for an abatement of the agreed purchase-money, which would be wholly contrary to every principle. If he came before conveyance, he might if misled, even by an innocent error, fairly say to the vendor, "I have been misled, and do not wish to have the estate, and if you insist upon my performing the contract and taking it, a fair abatement from the price ought to be made," in which case the vendor would be placed in a fair position, because if he was unwilling to part with his estate at the reduced price he might retain it; on the other hand, if the purchaser were entitled to insist upon retaining the estate, and at the same time claim an abatement of the price, the result would be that a vendor on account of a perfectly innocent and unintentional error might be compelled to part with his estate for a price that he never had and never would have agreed to, which appears to me contrary not only to the express terms of the contract but to every principle of law and justice. Nor can I reconcile Sir George Jessel's statement that "the theory is that the purchaser has contracted to take compensation if there is any variation from the particulars," with his assertion that "the purchaser may lose this right to compensation by shewing an intention to fulfil the contract, and waive any claim in respect of misdescription," because if his right rested upon contract simply so as not to be affected by the purchaser completing and taking a conveyance, I am unable to understand how his intention to fulfil and to waive such claim could affect his actual rights under the contract. I am further

(1) 17 Ves. 273. (2) 3 Mer. 237.
(3) 14 Ves. 128.

of opinion, secondly, that after the purchaser has taken a conveyance and the purchase-money has been paid, no action can be maintained either at law or in equity for damages or compensation on account of errors as to the quantity or quality of the subject-matter of the sale, unless such error amount to a breach of some contract or warranty contained in the conveyance itself, or unless some fraud and deceit has been practised upon the purchaser.

I will now apply these tests to the present case, and first was there any fraud practised upon the purchaser? And to this I answer unhesitatingly that there was not. The facts upon which this point rests are shortly these:—Upon the treaty for the sale the vendor represented the quantity of land as being three acres, whereas it was only 2*a*. 1*r*. 12*p*., and consequently the representation was untrue in fact. This representation was qualified afterwards by the language both of the contract and the conveyance, and the county court judge acquits the vendor of fraud.

This, in my opinion, ought to be decisive upon the question in favour of the vendor; but it was strenuously and ably argued before us that this positive and untrue representation amounted to and constituted a legal fraud, which entitled the purchaser to relief. It was contended that if a man takes upon himself to make a positive representation of fact in order, for his own benefit, to induce another person to act upon it, and the representation is acted upon, and it was at the time untrue in fact, that amounts to a fraud; and it was contended that that was exactly the present case, and that, notwithstanding the finding of the county court judge negativing fraud, his decision could be supported, taking the admitted facts, upon the ground that there was here legal, if not moral, fraud.

It cannot be denied that for some years in the history of our jurisprudence great doubt hung over the question whether, in order to maintain the common law action of deceit, it was necessary to establish actual moral fraud on the part of the defendant. In 1840 the Court of Exchequer decided in *Cornfoot* v. *Fowke* (1) that an untrue representation, upon the faith of which an agreement was entered into to take a furnished house, must in order to avoid the agreement have been not only untrue but actually false

(1) 6 M. & W. 358.

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and fraudulent on the part of the person making it. On the other hand, in the year 1842, the Court of Queen's Bench, in the case of *Fuller* v. *Wilson* (1), entirely dissented from the opinion of the Court of Exchequer, and decided, in an action brought by a purchaser of a house against the vendor for misrepresentation as to the house being free from rates and taxes, that, whether there was moral fraud or not, if the purchaser was actually deceived in his bargain, that was sufficient. The controversy between the two Courts continued for several years, until the point was decided in the Exchequer Chamber in 1845 in the case of *Ormrod* v. *Huth* (2), where it was laid down that an action of deceit was not maintainable without shewing that the representation was false to the knowledge of the person making it, or that he acted fraudulently in making it; and this must be taken now to be the settled and established law. In other words, ever since 1845 it has been clear and established law that, in considering the principles governing this class of cases, the term "fraud" must be used and understood in the common meaning of the word, as it is ordinarily used in the English language, and as implying some base conduct and moral turpitude. With all deference to those who have persistently continued to use the expression *legal fraud*, which, I believe, was first introduced by Lord Kenyon in 1801, it is certainly a matter of regret that the expression has ever been introduced into legal language. I adopt with regard to that expression the words of Lord Bramwell in *Weir* v. *Bell* (3), where he says: "I do not understand *legal fraud*. To my mind it has no more meaning than legal heat, or legal cold, legal light, or legal shade. There never can be a well-founded complaint of legal fraud except where some duty is shewn and correlative right, and some violation of that duty and right. And when these exist it is much better that they should be stated and acted on than that recourse should be had to a phrase illogical and unmeaning with the consequent uncertainty."

Armed with this authority of Lord Bramwell, I reject the phrase "legal fraud," as distinguished from "moral fraud and deceit," as wholly inapplicable and inappropriate to legal

(1) 3 Q. B. 58. (2) 14 M. & W. 651.
(3) 3 Ex. D. 238, 243.

discussion, and I simply ask the question in the present case, Do the facts disclose a case of fraud? and I reply unhesitatingly that they do not. Perhaps it is scarcely necessary to add that there can be no doubt that, if a man affirms something as a positive fact concerning which he has no knowledge whatever, knowing neither whether it is a fact or not, and does so intending to induce another person to act upon it as a fact and for his own benefit, regardless of whether the fact is so or not, then that is the strongest possible evidence of fraud in the plain meaning of the word, because by the hypothesis he could not have known that to be true as a fact which he pretended to know, and which he represented that he knew to be a fact. Still, even in such a case as that, the fraudulent element must be found to exist *as a fact*, and cannot be adopted as a mere *inference of law*. See *Taylor* v. *Ashton* (1), *Thom* v. *Bigland* (2), and *Rex* v. *Mawbey* (3), in which Lawrence, J., says: "Where a man swears to a particular fact without knowing at the time whether the fact be true or false, it is as much perjury as if he knew the fact to be false": and see *Haycraft* v. *Creasy* (4), where the defendant had said to the plaintiff that he knew as a fact of his own knowledge that he might trust a certain person to any amount, and it turned out that that person was in fact an impostor and without means, and that the defendant consequently could not in one sense have actually known what he said to be true, but that being himself duped he believed it. Lord Kenyon left the case to the jury as a case of fraud, not in the sense which affixes the stain of moral turpitude, but falling within the definition of *legal fraud*, and the jury under this direction found a verdict for the plaintiff; but this was afterwards set aside by the Court, on the ground that it was essential that the jury should find that the defendant had acted in bad faith and malo animo, and fraudulenter.

Perhaps it is also here necessary to guard against the supposition that a class of cases have been here included which come under an entirely different principle of law, for instance, cases where money may be recovered back where it has been paid under a mistake of fact, or where there has been a mutual

(1) 11 M. & W. 415.
(2) 8 Exch. 725.
(3) 6 T. R. 619, 637.
(4) 2 East, 92.

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mistake as to the subject-matter, as in *Bingham* v. *Bingham* (1), where a man purchased his own estate; or where there turns out to be no subject-matter in existence, as in *Hitchcock* v. *Giddings* (2), and *Hastie* v. *Couturier* (3), and *Gompertz* v. *Bartlett* (4); or where by reason of an innocent reticence or misrepresentation of fact in effecting a marine insurance the parties are not ad idem, and there is no contract from the beginning. All these cases belong to a different branch of the law, and form no real exception to the principle governing the present decision.

In support of the proposition that the rule is the same in equity as at law after conveyance, I may refer to *Wilde* v. *Gibson*. (5) In that case Mademoiselle D'Este, afterwards Lady Wilde, sold certain building lands upon the cliff at Ramsgate to Mr. Gibson. The lands were described in the treaty for the sale as adjoining a certain liberty way belonging to the town of Ramsgate, and unaffected by any right or liberty of way over them. After the purchase was completed Mr. Gibson discovered that the public way, called the Liberty Way, passed through the property at one point, and that the vendor's mother had executed a deed-poll to the authorities of the town acknowledging the right of way, and covenanting to pay 2*s.* 6*d.* a year for the privilege of inclosing the portion of the land over which it ran, and to open it whenever required. This 2*s.* 6*d.* had been regularly paid down to the date of the sale. Gibson filed his bill to set aside the conveyance, and Knight Bruce, V.C., entirely acquitting Mademoiselle D'Este of personal fraud or deception in the matter, set aside the conveyance. Upon appeal to the House of Lords this decree was reversed. Lord Cottenham based his decision upon this, that the plaintiff Gibson had rested his case in his bill upon personal misrepresentation and fraud, and upon that had founded his claim for setting aside his completed purchase, that he had only proved constructive notice, and that nothing short of positive knowledge could be sufficient for that purpose.

Lord Campbell said: "In the Court below the distinction between a bill for carrying into execution an executory contract

(1) 1 Ves. Sen. 126.
(2) 4 Price, 135.
(3) 9 Ex. 102.
(4) 2 E. & B. 849.
(5) 1 H. L. C. 605.

and a bill to set aside a conveyance that had been executed has not been distinctly borne in mind; with regard to the first, if there be misrepresentation or concealment which is material to the purchaser a Court of Equity will not compel him to complete the purchase; but where the conveyance has been executed . . . a Court of Equity will set aside the conveyance only on the ground of actual fraud: and there would be no safety for the transactions of mankind if, upon discovery being made at any distance of time of a material fact not disclosed to the purchaser of which the vendor had merely constructive notice, a conveyance which had been executed could be set aside." See also the observations of Cotton, L.J., in the recent case of *Arkwright* v. *Newbold* (1), and *Bree* v. *Holbeck* (2), *Legge* v. *Croker* (3), *Pasley* v. *Freeman*, 2 Smith's Leading Cases, and the authorities there cited.

The only further question remaining is, whether there was here any breach of any contract or warranty contained in the conveyance itself.

Now in answering this question we must turn to the conveyance, and there we find the land described as two parcels, each defined in the most particular manner by metes and bounds and other details, and each "as containing, by estimation, one and a-half acres or thereabouts."

It turned out when the lands came to be measured that the two parcels together amounted to only 2*a*. 1*r*. 12*p*. And the question is, does this amount to a breach of warranty as to quantity? It will be noted that the conveyance does not say "Containing by admeasurement so and so," but "containing by estimation so and so, or thereabouts." I am not aware that any exact definition has been judicially given to these words, although there have been several cases illustrating their meaning—for example, it has been held that a discrepancy of five acres out of forty-one was not so serious as to amount to a breach: *Winch* v. *Winchester* (4); on the other hand, a difference of 100 acres out of 349 was considered too serious to be covered by the qualifying expression: *Portman* v. *Mill*. (5)

(1) 17 Ch. D. 301.
(2) Doug. 654.
(3) 1 Ball & Bea. 506.
(4) 1 V. & B. 375.
(5) 2 Russ. 570.

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I am not able to extract any principle from these cases, but I would venture to say that the real question is whether the parcels had or had not in truth and in fact been estimated to contain the quantity stated or thereabouts? If the discrepancy were very small there would be very little difficulty in believing that it might have been so estimated; if the error were very great the statement might be rejected as incredible; but still I would venture to say that in each case it is a question of fact whether the quantity had been so estimated or not, and by this I mean of course a real genuine estimate, and not a merely illusory one. Now what is the evidence upon the point in the present case? It appears that the defendant had himself bought the land by the description that it contained by estimation three acres or thereabouts, that he never measured it, and that he, in fact, believed it to be three acres; that the plaintiff himself saw the land and was content to take it at the estimated quantity, and believed it to amount to three acres, and there is nothing, except the bare fact of the error, to shew that this estimate was an irrational still less an impossible one.

I come to the conclusion upon these facts that the land had been actually and in fact estimated at three acres or thereabouts, and that the plaintiff, upon whom the onus of proof lay to establish the contrary, did not do so, and that there was consequently no breach of any warranty.

I think, therefore, that the judgment of the county court judge was erroneous and ought to be reversed, and judgment ought to be given for the defendant.

A. L. SMITH, J. I had not the advantage of hearing the whole of the arguments in this case, but I concur in the result arrived at by my brother Williams in his judgment, which I have read, and in which my brother Cave agrees.

I wish to add upon the point which was much argued at the Bar on behalf of the respondent, viz., as to what constitutes fraud, that in my judgment an action for damages for deceit cannot be maintained unless the plaintiff establishes that the defendant has made a statement false in fact and fraudulent in intent.

If a man makes a statement knowing it to be untrue with the intention that another should act upon it, that obviously is fraud: so also if a man recklessly, not caring whether it be true or false, makes a statement with the intention that another should act upon it, that also is fraud. In both cases there is the moral turpitude which in my opinion is necessary to maintain an action for damages for deceit. If a man makes a statement which he believes to be true, but which is in fact untrue, even though made with the intention that another should act upon it, this, in my judgment, will not suffice to maintain an action for damages for deceit. In the present case the necessary moral turpitude is wanting.

It seems to me to be misleading to talk of legal fraud in such a case as distinguished from moral fraud, and I adopt what was said by Bramwell, L.J., upon the point in *Weir* v. *Bell* (1). In my judgment fraud, as above described and nothing short of it, must be established to sustain an action for damages for deceit.

Decision reversed.

Solicitors for appellant: *Taylor, Hoare, & Taylor, for Nodder & Gater.*

Solicitors for respondent: *Pickett & Mytton, for Bailey & White.*

E. L.

GREEN *v.* DUCKETT.

May 1.

Distress damage feasant—Impounding on Premises—Tender of Damages—Excessive Demand—Payment under Protest—Action for Money had and received—Extortion.

Where an animal distrained as damage feasant is impounded on private premises, and not in a common pound, a subsequent tender of sufficient compensation for the damage actually done is good, and if the distrainor by demanding an excessive sum for damages as the condition of his release of the animal obtains payment of such sum from the owner, such payment is not voluntary, and the sum paid may be recovered in an action for money had and received.

CASE stated on appeal from a decision of the judge of the Wells county court.

The action was brought to recover two sums of money, viz.,

(1) 3 Ex. D. 243.

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12*s.* 6*d.*, as to which no dispute arose, and which was paid into Court by the defendant before the trial of the action, and 1*l.* 18*s.* 6*d.* claimed by the particulars of demand as "amount paid under protest to the defendant for the purpose of obtaining possession of a bull wrongfully detained by him." Judgment was given for the plaintiff in respect of the said sum of 1*l.* 18*s.* 6*d.*, the facts under which that sum was claimed being proved to be as follows:

In August, 1882, a bull belonging to the plaintiff trespassed upon the defendant's land, and did damage, and was distrained damage feasant by the defendant.

Immediately upon the bull being distrained it was impounded by the defendant upon his own land. It was admitted that there was no proper or convenient pound in the locality to which the bull could have been sent. Subsequently to the impounding, the plaintiff demanded back the bull, and tendered the sum of 1*s.* 6*d.* as compensation for the damage done by such bull.

The defendant alleged that the damage done by the bull amounted to 2*l.*, and refused to give it up unless such amount of 2*l.* were paid by the plaintiff. The plaintiff accordingly paid to the defendant the sum of 2*l.*, but under protest as to the sum of 1*l.* 18*s.* 6*d.*, the difference between the sum of 1*s.* 6*d.* so tendered and the sum of 2*l.* so paid to the defendant. The county court judge found, as a fact, that the sum of 1*s.* 6*d.*, so tendered by the plaintiff, was sufficient to cover the amount of all the damage actually done by the bull, and gave judgment in favour of the plaintiff for 1*l.* 18*s.* 6*d.*, and leave to appeal.

The question for the opinion of the Court was whether the judgment for the plaintiff for 1*l.* 18*s.* 6*d.* was correct.

Pitt-Lewis, for the defendant. An action for money had and received does not lie: *Lindon* v. *Hooper*. (1) Where cattle are distrained as damage feasant, the owner cannot, without tendering amends, pay, under protest, an excessive sum demanded for damage, and recover the amount as money had and received to his use. If a sufficient tender is made before the distress, the remedy is replevin or trespass; if after the distress (before

(1) 1 Cowp. 414.

impounding), detinue: *Gulliver* v. *Cozens*. (1) That case has been regularly followed: *Glynn* v. *Thomas*. (2) The impounding was complete before the tender, which was therefore too late: *Thomas* v. *Harries*. (3) Replevin was the only remedy. In *Browne* v. *Powell* (4) the tender was in time, because the distrainor admitted that the animals were at the time of tender about to be forwarded to a public pound. A distinction was there suggested between a private and a public pound, but the passages relied on by the plaintiff are only dicta. Duress of goods is not sufficient ground for avoiding an agreement, *Skeate* v. *Beale* (5), or a payment of money, as in this case. The payment was voluntary, for the plaintiff had a remedy if he liked to pursue it. He chose to pay money to get his bull back, and the return of it was a new consideration for payment of the money so paid.

B. Coleridge, for the plaintiff. *Skeate* v. *Beale* (5) is explained in *Ashmole* v. *Wainwright* (6), in which it was held that an overcharge paid under protest to obtain goods from warehousemen might be recovered.

All the cases cited for the defendant were cases of impounding in a common pound. There is a distinction between a common and a private pound. For when beasts are placed in a common pound the owner knows where it is, and can go and offer to pay there.

[He was stopped.]

DENMAN, J. I think that the county court judge has taken the right view of the law and the facts. It was admitted by Mr. Pitt-Lewis, who argued the case ably for the defendant, that if the dicta in *Browne* v. *Powell* (4) are right, he is wrong, and the money sued for can be recovered back—subject to another point. The dicta are to the effect that where a man distrains cattle damage feasant on his own premises, and there is no question of taking them to a common pound, if a sufficient tender be made of the whole damages the tender is not too late, and ought to be accepted in discharge of the damages which have been sustained. I think those dicta are sound and good

(1) 1 C. B. 788.
(2) 11 Ex. 870.
(3) 1 Man. & G. 695.
(4) 4 Bing. 230.
(5) 11 Ad. & E. 983.
(6) 2 G. & D. 217.

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law, and that there is nothing in any of the cases cited which is to the contrary. The case most relied on for the defendant was *Thomas* v. *Harries* (1), in which the Court held that there the tender was too late. It had been made after distress and impounding for rent. But that case arose under the terms of a particular statute, authorizing a certain kind of impounding on the premises, and prescribing the steps to be taken both by landlord and tenant to pursue all the remedies on the one hand and the other according to law. That seems to me quite different from the case of cattle damage feasant being impounded at common law on the premises for want of a pound, and there is nothing in conflict with the dicta in *Browne* v. *Powell* (2), which are applicable to this case of impounding on the premises cattle damage feasant and tender of the whole damages on those premises. That is sufficient to dispose of this case so far as the authorities are concerned. The case is new and not exactly decided, but falls within dicta of very learned judges, with which I entirely agree. I think they cover the case, and are sound law, and on the authority of them, and on my agreement with them, I think the plaintiff had the right which the county court judge decided that he had. But it is said that an action for money had and received will not lie, because the sum sued for was voluntarily paid. *Ashmole* v. *Wainwright* (3) is a strong authority to the contrary. Nor is it the only authority, for the Court acted on the case of *Astley* v. *Reynolds*. (4) I think the county court judge was right in holding that this was not a voluntary payment.

There are also two other grounds on which I should have been prepared to decide this case. One is that I think that the doctrine of common law—de minimis non curat lex applies to the case of the defendant. The action is for 1*l.* 18*s.* 6*d.*, and the doctrine cannot be applied to that, certainly not in the county court where small sums are constantly sued for. But it seems to me that when the only possible matter justifying the retention of this animal was the sum of eighteenpence, it would be a violation of the principle de minimis non curat lex if we allowed the

(1) 1 Man. & G. 695.
(2) 4 Bing. 230.
(3) 2 G. & D. 217.
(4) 2 Strange, 915.

defendant to escape from the obligation of repaying the excessive sum extorted by saying to the plaintiff, "There is a court open to which you might go. I having a right only to a sum ranging from a farthing to eighteenpence, and shewing that right, you must resort to replevin."

That is an argument against the defendant. Supposing, however, that not to be so, I should be prepared, independently of the cases already decided, to hold that where there is the element of pure extortion which clearly exists here, in impounding and keeping the animal without a colour of right to the sum demanded, the law would not at the present day leave the plaintiff to replevy as his only remedy. I think the element of extortion is so clearly shewn that an action for money had and received will lie even if in the absence of that element it might not do so.

HAWKINS, J. I am of the same opinion. The defendant was undoubtedly within his legal rights when he distrained this bull on his premises, it having done damage to a nominal amount. The question is whether or not he had a right to keep the bull after tender of a sum exceeding the amount of the damage actually done. It is unnecessary for me to say what my judgment would have been if the bull had been removed to the pound in the custody of the law. Here it was not in the custody of the law in that sense at all, but was in the custody and under the sole control of the defendant who had distrained it, and while it was under that control the owner went to the defendant and said in effect, "True my bull has entered your premises without any right and has done you some damage. I do not believe that he has done so much as you say or indeed any, but rather than have a dispute I tender you eighteenpence, the utmost amount of damage which can have been done," and the county court judge has found that eighteenpence was clearly the utmost amount. The effect of the defendant's reply is, "I will not accept the eighteenpence, although I cannot shew that the bull has done even a farthing's worth of damage; but I will put you under a penalty, that is, I will extort from you 1*l.* 18*s.* 6*d.* over and above the eighteenpence and without a colour of right, and unless you give

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me two sovereigns your bull shall remain here and you shall not have the use of it." The plaintiff answers, "I protest against this extortion and having to pay 2*l.* damage when you know that the bull has not done so much or any, nevertheless as I want my bull, and I cannot without force—which perhaps I might be wrong in using—get my bull, I pay the 2*l.* to get it." Mr. Pitt-Lewis contends that, however unreasonable, the law is in his favour, and justifies the contention that the bull being impounded the owner could not get it out by tender, but must resort to the process of replevin, and that that is a fair penalty to impose on the owner for allowing the bull to trespass. I think there is a wide distinction between a public and a private pound. If the bull were put into a public pound he would be in the custody of the pound-keeper, an officer of the law, and be in the custody of the law. That being so, the owner of the land might well say, "My damages are unsatisfied. The bull being in the custody of the law you must go and get him out by process of law, you have no right to put me to the trouble and expense of doing so." But that is not the present case. The bull was on private ground, the shed of the defendant, who had incurred no cost in keeping the bull, and had nothing more to do to release him from custody than to turn a key in a lock. I see a wide distinction between taking an animal out of the hands of an officer of the law, and letting the animal out of a private shed. The distinction seems to me sound sense as well as law, and certainly in accordance with *Browne* v. *Powell* (1), in which Best, C.J., said: "The cattle at the time of the tender were clearly destined for the pound at Leominster. Even if this had been otherwise, it is by no means clear that the confinement in which the sheep were at first placed would have been a sufficient pound to make a tender of amends too late. It is not necessary now to decide that point, but it seems that the pound of the lord of the manor is the only pound for such a purpose; if it were otherwise, the distrainor, by impounding on the spot where he takes the cattle, or very near, might exclude the possibility of any tender of amends being made. The pound, therefore, which will exclude such a tender must be a pound in which the cattle are no longer in the

(1) 4 Bing. 230, at p. 232–3.

custody of the party." That being the case as to a sufficient tender being made when the cattle were in the custody of the distrainor, and before they got into the custody of the law, in the sense in which I use the term, I say the tender was not too late but was made in sufficient time, and the duty of the distrainor was to unlock his gate and release the animal. He did not. Then comes the question whether, he not having done so, and having extorted 2*l.*, the owner of the bull having paid the money under those circumstances can get it back. To term such payment a voluntary payment would be revolting to common sense, and I am glad to find an authority in the case cited by Mr. Coleridge which is full justification for our decision that this cannot be considered as a voluntary payment. The consequence of adopting the argument for the defendant would be that a man by falsely, fraudulently, and extortionately pretending that he has sustained damages to a large amount, when he knows he has not sustained damage to any amount, might obtain payment of sums by means of extortion, under circumstances which might possibly render him liable to the criminal law, and yet be able to retain the money.

Appeal dismissed, with costs.

Solicitors for appellant: *Prior, Bigg, & Co.*
Solicitors for respondent: *Bolton, Robbins, & Busk.*

J. R.

1883
May 29.

THE QUEEN *v.* W. G. THOMAS, CLERK, VICAR OF ST. ASAPH AND OTHERS.

Highway—Meeting for Elections of Waywardens—Several Elections—Demand of Poll—Time for—Mandamus.

At a vestry meeting held to elect waywardens for eleven townships, different candidates were successively and separately nominated, proposed, and seconded, and, after show of hands, declared by the chairman to be duly elected waywardens for each township. After waywardens had been thus elected for all the townships, an elector demanded a poll in respect of the sixth and seventh townships in order of election. The chairman ruled that the demand was too late, and refused a poll.

On a rule for a mandamus to the defendants to reassemble the meeting, and proceed to an election of waywardens for the two townships:—

Held, that the proceeding in respect of each township was a separate election, and that the demand for a poll was too late, as it should, in each case, have been made upon the declaration of the show of hands.

RULE nisi for a mandamus to the vicar, churchwardens, and inhabitants of a parish, commanding them to convene and reassemble a meeting in vestry as by adjournment from the 27th of March last, and to proceed to the election of waywardens to serve on the Highway Board of St. Asaph Highway District, in respect of the townships of Bodengan and Gwernglefyd in the parish, and to hold a poll of the ratepayers of the said townships for such election, and to take all necessary steps for that purpose pursuant to the statute in that behalf.

From affidavits it appeared that at a vestry meeting held on the 27th of March, 1883, for the parish of St. Asaph, the vestry proceeded to elect waywardens for eleven townships. The election, over which the respondent vicar presided as chairman, was as follows: A wayward en was proposed for one township and seconded, and in the absence of an amendment, he was declared by the chairman duly elected. If, however, an amendment was proposed and seconded, the names of the candidates proposed were put to the meeting which voted, according to the custom of the parish, by show of hands, whereupon the chairman declared the successful candidate duly elected waywarden for that township. The election of a waywarden for another township was then held, and so on until waywardens had been successively

declared elected for all the townships. The declaration by the chairman of the result of the show of hands in favour of the waywardens respectively elected for the township of Bodengan and Gwernglefyd, which were sixth and seventh respectively in order of election, was not challenged at the time. But after there had been eleven distinct and separate elections and declarations by the chairman, a voter demanded a poll for Bodengan and Gwernglefyd. The chairman ruled that the demand was too late. The voter applied for and obtained the above-mentioned rule.

A. M. Channell, shewed cause. Elections for waywardens are held under 25 & 26 Vict. c. 61, ss. 3, 10. There were eleven separate elections. A poll should have been demanded at the end of any one which was challenged.

The demand at the end of all was too late:—*Reg.* v. *The Vicar of Hillingdon.* (1) Voters for the particular townships might then have left.

[He also argued that the qualification of the waywardens elected was good, and this from affidavits and uncontradicted statements in Court as to residence appeared to be so.]

The offices are full, and therefore quo warranto and not mandamus would be the remedy, if any: *Reg.* v. *Cooper.* (2)

C. B. Stuart Wortley, in support of the rule. The election was all one. The demand of the poll was made before the end of the proceedings, and was therefore in time. To hold a poll in the midst of them would be inconvenient. The offices are not full. The waywardens alleged to have been duly elected have not acted as such, and that would have been raised as an objection to quo warranto. The prosecutor has an interest in the election, and is entitled to mandamus: see *The Queen* v. *Mayor of Peterborough.* (3)

WATKIN WILLIAMS, J. This rule must be discharged. It has been said that the persons alleged to be elected waywardens were not duly qualified and that the elections can be treated as void, and the offices vacant; further, that the authorities declared

(1) 18 Q. B. 718. (2) Law Rep. 5 Q. B. 457.
(3) 44 L. J. (Q.B.) 85.

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duly elected have not accepted and have not acted, and that therefore the offices may be treated as vacant, and that mandamus is the right remedy. If it seems plain that a sufficiently good answer would be made to the mandamus, we ought not to issue it, and I am satisfied that, taking the affidavits in this case, and the nature of it, and the facts brought before us, if mandamus issued there would be a clear answer to it. I think the offices are properly full. Next it was said that the election proceeded only to a certain extent, and that while it was still in fieri a poll was demanded, and the returning officer improperly refused it and improperly declared the person in whose favour the show of hands had been made was duly elected, and a mandamus is asked for to order the returning officer to proceed with the election. I think that contention also entirely fails. It raises a question on which no exact authority has been cited, viz., how and when a poll should be demanded. I am clearly of opinion that when an election is proceeding by show of hands or by voices, the duty of the chairman is to form a judgment to the best of his ability and to declare the show of hands or the voices to be in favour of A. or B., and that declaration, which is provisional only, must be considered his judgment of what the electors intended, and when he has given it, and an elector means to demand a poll, he should do so at once, and before the meeting proceeds to other business.

Then we come to the question in this case, was there one election of all the waywardens for the eleven townships, or were there separate and distinct elections for each township? It seems to me quite plain that there was a separate and distinct election of a waywarden for each separate township, and that each election must be taken by itself, terminating with the declaration made of the result of a show of hands, and a poll taken if necessary on each declaration independently, and consequently that when the chairman declared his opinion on the show of hands that the election was in favour of anyone, that opinion should have been challenged at once.

A. L. SMITH, J. I am of the same opinion. There were eleven townships to which eleven separate waywardens had to be

elected, and for the purpose of putting eleven separate wardens up for the eleven particular townships, there were eleven different proposers and seconders. The elections were held pursuant to an order of justices made under 25 & 26 Vict. c. 61, s. 10, that each township should elect one waywarden. I think there was a separate election in each case of a separate waywarden for each separate township. Then the question arises at what time a poll should be demanded, if at all. I think that in such a case, the separate business as to each township is over when the result of the show of hands is declared by the returning officer, and that when the result of the show of hands as regards one township is declared, then is the time for the parties who wish to challenge the result to challenge it, and to demand a poll, and I am of opinion that in this case the demand, at the end of all eleven elections, of a poll for Nos. 6 and 7 was too late. There is another point. I entertain considerable doubt whether mandamus should go under any circumstances, even if my opinion on the first point were other than it is, for if we let the mandamus issue, a good return to it would be made, viz., that the office is full and that A. B. is elected and in the office. With respect to the point raised as to the qualification of the waywardens elected, it seems that they do live in the parish.

Rule discharged.

Solicitors for prosecutor: *Finney, Bruff, & Cass.*
Solicitors for defendants: *Bolton, Robbins, & Co.*

J. R.

1883
June 12.

BURTON *v.* THE MAYOR AND CORPORATION OF SALFORD.

Highway—Limitation of Action—Urban Authority—Surveyors of Highways constituted by Local Act—5 & 6 Will. 4, c. 50, s. 109—5 & 6 Vict. c. 97, s. 5—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 144, 264, 341.

By a local Act passed in 1862, the corporation of Salford were constituted surveyors of highways within the borough, having and being subject to all such powers and liabilities as any surveyors of highways had or were subject to by virtue of the law for the time being in force. Sect. 109 of 5 & 6 Will. 4, c. 50 (the Highway Act of 1835), limits the period within which any action may be brought for anything done under the authority of that Act to three months after the fact committed for which the action is brought. Sect. 5 of 5 & 6 Vict. c. 97, limits the period within which any action may be brought for anything done under the authority of local Acts to two years after the cause of action. By the Public Health Act, 1875, s. 144, urban authorities (including by s. 6 corporations of boroughs), are constituted surveyors of highways within their district, having and being subject to all the powers, duties, and liabilities (so far as the same are not inconsistent with the provisions of that Act) of surveyors of highways under the law for the time being in force. Sect. 264 limits the period within which actions may be brought for anything done under that Act to six months after the cause of action accrued; and by s. 341, all powers given by that Act shall be deemed to be in addition to and not in derogation of any other powers conferred by statute, and such other powers may be exercised in the same manner as if that Act had not passed.

In an action against the corporation for negligence, as surveyors of highways, commenced more than three but less than six months after the cause of action accrued :—

Held, that the defendants were entitled to rely on the limitation of three months provided by 5 & 6 Will. 4, c. 50, and therefore that the action could not be maintained.

Taylor v. *Meltham Local Board* (47 L. J. (C.P.) 12) distinguished.

FURTHER CONSIDERATION.

The facts and arguments are stated in the judgment.

May 29. *Gully, Q.C.* (*Burder* with him), for the plaintiff.
E. Sutton, (*C. Russell, Q.C.* with him), for the defendants.

Cur. adv. vult.

June 12. CAVE, J. This is an action brought by the plaintiff, a bootmaker at Manchester, against the defendants, as surveyors of highways in Salford, for having negligently in the course of repairing a highway called Bury New Road made and left

unguarded a hole in the highway, into which the plaintiff drove. At the trial at Manchester before me, without a jury, the damages were agreed upon subject to the question of whether the action was commenced in time, which was reserved for further consideration, and was argued before me on the 29th of May.

The cause of action arose on the 11th of July, 1882, and the action was brought on the 8th of January, 1883. Mr. Gully, for the plaintiff, contended that the period of limitation applicable to the case was not less than six months, and consequently that the action was in time. For the defendants it was urged that the period of limitation was three months, and that the plaintiff's action was barred.

The corporation of Salford were first made surveyors of highways by 13 & 14 Vict. c. lxxv., s. 85, which enacted that the mayor, aldermen and burgesses of the borough of Salford, and none other, should be the surveyors of all highways within the limits of that Act, and within those limits should have all such powers and authorities, and be subject to all such liabilities as any surveyors of highways were invested with and subject to by virtue of the law for the time being in force.

This Act provides no period of limitation. A period of three months had been fixed by a former Act, 11 Geo. 4, c. viii., s. 211, but that section was repealed by 7 Vict. c. xxxiii., s. 158, probably in recognition of the repeal effected by 5 & 6 Vict. c. 97, s. 5, which enacts that the period within which any action may be brought for anything done under the authority or in pursuance of local and personal Acts shall be two years.

The Highway Act of 1835 (5 & 6 Wm. 4, c. 50) enacts, in sect. 5, that all the powers thereby given to, and notices, matters, and things required for, and duties, liabilities, and forfeitures imposed on surveyors, shall be applicable to all persons, bodies politic or incorporate liable to the repair of any highway; and by sect. 109 it is provided that no action shall be commenced against any person for anything done in pursuance of or under the authority of that Act after three calendar months next after the fact committed for which such action shall be brought.

Upon this a question arises whether after the passing of 13 & 14 Vict. c. lxxv., the period of limitation for actions against

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the corporation for things done by them as surveyors of highways was two years, as provided by 5 & 6 Vict. c. 97, s. 5, or three months, as provided by 5 & 6 Will. 4, c. 50, s. 109. Such an act would be done partly under the authority of the Highway Act, 1835, which authorized the act to be done by surveyors of highways, and partly under the authority of 13 & 14 Vict. c. lxxv., which made the corporation such surveyors. Looking at 13 & 14 Vict. c. lxxv. s. 85, which enacted that the corporation were to be subject to all such liabilities as any surveyors of highways were subject to by virtue of the laws for the time being in force, I think the better opinion is that the period of limitation for anything done by the corporation as surveyors of highways was the three months provided by the General Highway Act, and not the two years provided by 5 & 6 Vict. c. 97, s. 5, for anything done under a local or personal Act. The corporation were surveyors of highways having equal powers and liabilities with ordinary surveyors of highways, and the only difference between them was that ordinary surveyors of highways became such by virtue of their election by the vestry under sect. 6 of the Highway Act, while the corporation became surveyors by virtue of their local Act. I cannot see why this difference in the method by which they became surveyors should produce a difference in their position or liability after they had become surveyors. The 13 & 14 Vict. c. lxxv. has been repealed by the Salford Improvement Act, 1862, which however, by sect. 162, enacts that the corporation, and none other, shall continue to be the surveyors of all highways within the borough, and except as is by this Act otherwise provided shall have all such powers and authorities and be subject to all such liabilities as surveyors of highways are invested with or subject to by virtue of any laws for the time being in force relating to highways. The same considerations however apply; and if the period of limitation for any thing done by the corporation as surveyors of highways during the operation of 13 & 14 Vict. c. lxxv. was, as I think it was, three months, it follows that the period of limitation was not affected by and remained the same after the coming into operation of the Salford Improvement Act, 1862.

By the Public Health Act, 1875, s. 144, it is enacted that every

urban authority (which by s. 6 includes corporations in boroughs) shall within their district, exclusively of any other person, execute the office of and be surveyor of highways, and have, exercise, and be subject to all the powers, authorities, duties, and liabilities of surveyors of highways under the law for the time being in force, save so far as such powers, authorities, or duties are or may be inconsistent with the provisions of this Act. By s. 264 every action against any local authority for anything done or intended to be done, or omitted to be done, under the provisions of this Act, shall be commenced within six months next after the accruing of the cause of action, and not afterwards. By s. 340 it is provided that where within the district of a local authority any local Act is in force providing for purposes the same as, or similar to, the purposes of this Act, proceedings may be instituted, at the discretion of the authority or person instituting the same, either under the local Act, or this Act, or both; and, by s. 341, that all powers given by this Act shall be deemed to be in addition to and not in derogation of any other powers conferred by Act of Parliament, law or custom, and such other powers may be exercised in the same manner as if this Act had not passed.

Mr. Gully cited the case of *Taylor* v. *Meltham Local Board* (1), in which it was held that an action against a local board for a matter done by them as surveyors of highways might be brought within six months, and need not be commenced within the three months limited by 5 & 6 Wm. 4, c. 50, s. 109; and he contended that according to the principle of that decision the period of limitation was two years if the corporation were acting under the local Act, and six months if they were acting under the Public Health Act.

In that case the defendants had become surveyors of highways by virtue of 11 & 12 Vict. c. 63, s. 117, which constituted the local board of health surveyors of highways with all such powers, authorities, duties, and liabilities as any surveyor of highways in England. Sect. 139 of the same Act provided that every action against the local board should be brought within six months. The local board were made surveyors of highways by 11 & 12 Vict. c. 63, and having been so made, did the act in question by

(1) 47 L. J. (C.P.) 12.

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virtue of the powers conferred on them as such surveyors by the General Highway Act; and the Court held that the proper period of limitation was the six months prescribed by 11 & 12 Vict. c. 63, and not the three months prescribed by the Highway Act.

It seems to me, however, that there is a distinction between the facts of *Taylor* v. *Meltham Local Board* (1) and the present case, and that the ratio decidendi in that case does not apply here. The Court there thought that the retention of three months as the period of limitation for acts done by the local board as surveyors was inconsistent with s. 139, which fixed a period of six months for all acts done by the local board or their officers, and that there was a clear intention displayed in that section that in respect of all their acts the local board and their officers should be grouped together as one class having the same period of limitation, and should not be divided into classes having different privileges as to time according to the nature of the act done. In this case there is nothing in the local Acts corresponding to the language of s. 139 of 11 & 12 Vict. c. 63, and I think that if I held that the corporation under their local Acts remained liable for acts done by them as surveyors of highways for two years, I should in effect be altering s. 162 of the Salford Improvement Act, 1862, which enacts that they shall be subject to such liabilities as surveyors of highways are subject to. I should also be introducing the anomaly that, in an action against the corporation of Salford for an act done by them as surveyors of highways, the period of limitation would be two years, while in an action against the surveyors of the adjoining parish for a similar act the limitation would be three months. I think that the legislature cannot have intended that there should be a different limitation for similar acts done by the same public officers discharging the same duties conferred by the same statute, because in the one case those public officers were elected to the office by the vestry, and in the other case appointed to the office by a local Act.

The case of *Taylor* v. *Meltham Local Board* (1) does, indeed, extend to decide that if the corporation were acting as surveyors of highways by virtue of the Public Health Act the limitation was six months, and not three months; but the Public Health

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Act, in the sections I have cited, empowers the corporation to act at their discretion either under the local Act or the Public Health Act. The statement of defence seems to contain an allegation that the corporation were acting under the local Act, and I do not know why I should assume, in the absence of any proof, that they in their discretion chose to act under the later statute, with the consequence of increasing the duration of their liability from three months to six.

On these grounds I am of opinion that my judgment must be for the defendants, with costs.

Judgment for the defendants.

Solicitors for plaintiff: *Yielding & Barlow*, for *Warner & Burder, Manchester.*

Solicitor for defendants: *John Graves, Salford.*

W. A.

EX PARTE WAKE.

May 25.

Local Government Acts—Justices of the Peace—Summary Proceedings—Jurisdiction—Public Health—Expenses of Sewering Street—The Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

Upon the hearing of a complaint preferred before a police magistrate by the urban authority of the district, acting under s. 150 of the Public Health Act, 1875, to recover the amount apportioned upon a frontager in respect of expenses incurred by the urban authority in sewering, &c., a street, the frontager objected that the plans referred to in the notice requiring him to execute the work shewed that part of the work, in respect of which upon his failure to comply with the notice the expenses were incurred, was executed upon land belonging to private owners. The magistrate found as a fact that the land did not belong to private owners, but formed part of the street when the notice was given, and made an order for payment of the amount apportioned. Upon an application for a writ of certiorari upon affidavits which satisfied the Court that the magistrate's finding was contrary to the fact:—

Held, that the magistrate nevertheless had jurisdiction to entertain the complaint and make the order, and therefore that the frontager was not entitled to a writ of certiorari.

Semble, per Cave, J., that the applicant's proper remedy was to appeal to the Local Government Board, under s. 268 of the Public Health Act, 1875, against the notice of demand for payment of the apportioned sum given by the urban authority, and not to appeal against the magistrate's order to quarter sessions.

APPLICATION for a writ of certiorari to bring up an order made by the stipendiary magistrate of the borough of Sheffield, under

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s. 150 of the Public Health Act, 1875, requiring the applicant to pay a sum of 74*l.* as his proportion of the expense of levelling, paving, and sewering a certain street, and also to bring up an order made by the recorder of the borough at quarter sessions, confirming the order of the magistrate.

The affidavits used upon the argument of the rule disclosed the following material facts:—

On the 6th of November, 1879, the corporation of Sheffield, who are the urban sanitary authority of the district, served a notice upon the applicant, under s. 150 of the Public Health Act, 1875, requiring him, as owner of certain premises abutting on a street called Platt Street, within the district, to sewer, level, &c., the street within one month from the date thereof, according to details of construction therein specified, and in accordance with the plans and sections lying at the office of the corporation, and the dimensions, widths, and levels shewn therein. The applicant having failed to comply with this notice, the corporation themselves executed the work indicated on the plans at a cost of 340*l.*, and the borough surveyor apportioned the sum of 74*l.* as the proportion to be paid by the applicant in respect of the frontage of his premises upon Platt Street, and, on the 25th of November, 1880, gave notice to him of the execution of the works and of the apportionment.

On the 25th of February, 1881, the applicant gave notice to the corporation that he disputed the apportionment referred to in the last-mentioned notice, "and the whole of your acts in reference to the matters in the said notice mentioned."

On the 22nd of September, 1881, the corporation gave notice to the applicant that they had appointed an arbitrator "to settle the apportionment, and to do all such other acts as are required by the Public Health Act, 1875."

The applicant failed to appoint an arbitrator on his part, and the arbitrator appointed by the corporation became the sole arbitrator in the matter. The applicant did not attend the arbitration, and the arbitrator, by his award, apportioned the applicant's proportion of the expenses at the original sum of 74*l.*

Upon a summons obtained by the corporation to enforce payment of the above sum, the applicant appeared before the

stipendiary magistrate, and took the objection (inter alia) that the plans referred to in the notice of the 6th of November, 1879, shewed that part of the contemplated works, in respect of which the sum of 340*l.* was subsequently expended by the corporation, was executed upon two pieces of land which did not form part of the street, but were private property.

The magistrate found as a fact that the two pieces of land at the date of the notice formed part of the street, and made an order that the applicant should pay the apportioned amount claimed.

The applicant appealed from this order to quarter sessions. At the hearing of the appeal the recorder found as facts that neither of the pieces of the land formed part of the street at the date of the notice; that one of them was still enclosed within walls, and no binding agreement for its transfer to the corporation, nor for dedication by the owners, had been made, nor did it appear that any such agreement had been made between the corporation and the owners of the other piece of land; and the recorder was therefore of opinion that the corporation had no power to deal with either piece of land under s. 150 of the Public Health Act, 1875, or to throw upon the owners of adjoining property any portion of the expenses of converting such land into a street. But the recorder was of opinion, upon the authority of *Hall* v. *Potter* (1), *Cook* v. *Ipswich Local Board* (2), and *Reg.* v. *Local Government Board* (3), that the objection was not one which could be entertained by justices upon an application to order payment of the sum apportioned, and that the remedy of the appellant was to appeal against the notice of demand of the apportioned sum to the Local Government Board under s. 268. He therefore confirmed the order of the stipendiary magistrate.

The applicant obtained a rule for a writ of certiorari.

Sir F. Herschell, S.G. (*J. E. Barker* and *C. S. Hunter*, with him), shewed cause. In order to entitle the applicant to a writ of certiorari he must shew that the respective orders of the magistrate and the recorder were made without any jurisdiction; it is

(1) 39 L. J. (M.C.) 1. (2) Law Rep. 6 Q. B. 451.
(3) 9 Q. B. D. 600; 10 Q. B. D. 309.

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not sufficient to allege that a wrong conclusion was arrived at. There was clearly jurisdiction to make an order for payment of the apportioned sum, and the magistrate and the recorder could not inquire into the question whether the apportioned amount had been actually expended in paving, &c., the street: *Cook* v. *Ipswich Local Board.* (1) The applicant ought to have appealed to the Local Government Board under s. 268 of the Public Health Act, 1875: *Reg.* v. *Local Government Board.* (2) [He was stopped.]

A. Charles, Q.C., and *C. Gould*, supported the rule. The magistrate and the recorder had no jurisdiction to make an order for payment by the applicant of the apportioned sum. The recorder has found that the magistrate was wrong in coming to the conclusion that the two pieces of land formed part of the street. The apportionment therefore was a nullity, being an apportionment in respect of moneys part of which were expended upon the street and part were not. Where jurisdiction is disputed, the magistrate, though he is bound to make a preliminary inquiry for his own protection, cannot confer jurisdiction upon himself by deciding erroneously upon a collateral point, and his decision can always be reviewed by a superior Court: *Bunbury* v. *Fuller.* (3) A frontager, though he cannot dispute the correctness of the apportionment as between himself and his neighbours in the street, may yet dispute before justices that the sum apportioned was chargeable at all: *Hesketh* v. *Atherton Local Board.* (4)

[WATKIN WILLIAMS, J., referred also to *Hull Local Board* v. *Jones.* (5)]

Cook v. *Ipswich Local Board* (1) is in harmony with this contention. In that case the local authority having executed sewering and paving work in two streets the surveyor cast the expenses incurred in respect of each street together and apportioned on that basis. Upon an application before justices to obtain payment of one of the sums apportioned on a frontager the justices rightly dismissed the complaint, and the surveyor made a fresh

(1) Law Rep. 6 Q. B. 451.
(2) 9 Q. B. D. 600; 10 Q. B. D. 309.
(3) 9 Ex. 111; judgment of the Court at p. 140.
(4) Law Rep. 9 Q. B. 4.
(5) 1 H. & N. 489; 26 L. J. (Ex.) 33.

apportionment which was held to be good because the first was a nullity; and the subject-matter of appeal to the Secretary of State in that case was said to be the propriety of the charges made for the work which was properly executed. *Hall* v. *Potter* (1) does not touch the present case, the decision being that where the local authority give notice to a frontager in respect of land part of which is within and part without their authority, the notice is not bad if the execution of the work is in fact confined to the part within. *Reg.* v. *Local Government Board* (2) does not affect the question of jurisdiction. The appeal given by s. 268 is only an alternative remedy.

[*Reg.* v. *Bolton* (3) and *Williams* v. *Adams* (4) were also referred to.]

WATKIN WILLIAMS, J. I am clearly of opinion that this rule should be discharged. [His lordship stated the facts.] It was argued for the applicant that certain conditions precedent to the exercise of jurisdiction by the magistrate and the recorder were absent; and that their jurisdiction being a limited one, if they proceeded to hear and adjudicate on the matter in the absence of those conditions precedent, they could not confer jurisdiction upon themselves by finding that to be a fact which was not a fact. It may be conceded that the true facts may be looked at in order to determine whether they had jurisdiction; but I fail to see that the conditions which are here alleged to be absent were conditions precedent to the exercise of the jurisdiction. It was said that the notice to execute the work given by the local authority to the applicant was the foundation of the debt in respect of which proceedings were taken; that the validity of that notice depends upon the existence of the conditions precedent that it should be a street; a street not repairable by the inhabitants at large; and that the person who is ordered to level, pave, and sewer it should be an owner of property adjoining or abutting upon the street. It was argued, further, that if the notice was a bad one in the sense that the locus in quo was not a street, or being a street was repairable by the inhabitants at

(1) 39 L. J. (M.C.) 1.
(2) 9 Q. B. D. 600; 10 Q. B. D. 309.
(3) 1 Q. B. 66.
(4) 2 B. & S. 312; 31 L. J. (M.C.) 109.

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large, the local authority are wholly disentitled to proceed to execute the work in default of the adjoining owner executing it, and that if they do execute the work and incur the expense, and an award is made upon an arbitration under the Act, the whole proceedings are vitiated ab initio. It is said that the effect is not merely to make the proceedings bad so that the person sought to be charged with a proportion of the expenses is entitled to resist them, but to deprive justices of all power to adjudicate upon the matter. To my mind it is perfectly clear that no such effect results. The foundation of the jurisdiction of the justices is this: the matter arises within the ambit of their jurisdiction as justices for the locality; there is in fact a notice given by the local authority; in fact the work is executed and the award made. I am clearly of opinion that, these matters existing or alleged to exist, justices not only have jurisdiction to entertain the summons but are bound to entertain it. Every one of the steps taken by the local authority could be resisted. If the street is in fact a highway repairable by the inhabitants at large, justices are bound to entertain and give effect to the objection and dismiss the summons, but I fail to see that if they come to an erroneous decision on the question the effect is to shew that they had no jurisdiction. The proper remedy of the person who is dissatisfied with their decision is to appeal against it in the way provided by the law.

It is not necessary for me to refer to the cases which were cited in argument: I do not think any of them are in conflict with the view I have expressed, and some of them seem to confirm it. I entertain no doubt that the magistrate had jurisdiction in the present case, and his order cannot be questioned in this Court by moving for a writ of certiorari.

Cave, J. I also am of opinion that this rule should be discharged. In order to entitle himself to a writ of certiorari the applicant has to shew that the magistrate and the recorder had no jurisdiction to entertain the complaint. The word "jurisdiction" is equivocal. When it is said that there was no jurisdiction, that expression may mean either that the case was one into which the magistrate ought not to have inquired at all, or one in

which, having inquired into it, he ought not to have made the order asked for. In other words what have been termed "conditions precedent to the jurisdiction," may be either conditions precedent to the right of the magistrate to entertain the matter at all, or conditions precedent to his making a just order in it. In my opinion the objections taken before the magistrate in this case were not in respect of matters which were conditions precedent to his right to entertain the complaint at all. The Act seems to me to give jurisdiction to the magistrate, and to him only, in the clearest possible terms. The expenses which have been incurred by the local authority are to be recovered by summary proceedings taken before him. That being so, upon the hearing of the summons objection is taken that the notice given to the applicant referred to and included private property. How can that objection be raised as a plea to the jurisdiction? It cannot be maintained that, upon the assertion being made that the notice includes private property, the magistrate is precluded from entertaining the question, and that some other tribunal ought to decide it. If the objection is well founded it may be a reason why the order should not be made, but it does not oust the magistrate's jurisdiction altogether, and, if it does not, no ground is shewn for a certiorari.

I am therefore clearly of opinion that the magistrate and the recorder had jurisdiction, and that is sufficient to dispose of this case. But I desire to express my opinion that the learned Recorder of Sheffield came to a right conclusion. In my judgment the applicant ought to have appealed to the Local Government Board under s. 268 of the Public Health Act, 1875, instead of raising this objection before the magistrate. It is a far more convenient course to appeal under s. 268, because the magistrate can only absolutely grant or refuse the order, whilst the Local Government Board can modify the order, and make such an order as under all the circumstances is equitable. I think the language of s. 268 is wide enough to include an appeal from the notice of demand, and I read the judgment of the present Master of the Rolls in *Reg.* v. *Local Government Board* (1) as a distinct intimation of his opinion that an appeal would lie to the Local Government Board

(1) 9 Q. B. D. 600; 10 Q. B. D. 309.

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in such a case as this. In the case of *Hesketh* v. *Atherton Local Board* (1), which appeared at first sight to conflict with that view, it does not seem that the attention of the Court was called to the existence of any provision in the Public Health Acts corresponding to s. 268 of the Act of 1875. That case therefore does not appear to me an authority against my view.

A. L. SMITH, J. I am of opinion that the rule should be discharged. It is immaterial whether or not the magistrate was right upon the facts. The question is whether he had jurisdiction to entertain the application before him upon the summons. Upon the award of the arbitrator having been made, it became necessary for the local authority to obtain payment of the apportioned sum by taking summary proceedings under the Act. At the hearing of the complaint by the magistrate the present applicant contended that payment of the amount awarded against him ought not to be enforced because the apportionment was bad, being made upon a notice comprising land which did not form part of the street in respect of which the applicant was an adjoining owner of property. On the other hand the local authority contended that the apportionment was good, because the land did form part of the street. Who is to decide that question? I think it was clearly within the magistrate's jurisdiction to say which of those contentions was right. It is said that he had no jurisdiction, because upon investigation it has turned out that the land did not form part of the street. I cannot better express my view upon that part of the argument than by adopting the language of Denman, C.J., in *Reg.* v. *Bolton.* (2) He says, "But if the charge be of an offence over which, if the offence charged be true in fact the magistrate has jurisdiction, the magistrate's jurisdiction cannot be made to depend on the truth or falsehood of the facts, or upon the evidence being sufficient or insufficient to establish the corpus delicti brought under investigation." It is conceded that if in this case the land was in fact part of the street, the magistrate would have had jurisdiction. I do not think that this case is governed by *Bunbury* v. *Fuller* (3) where the decision

(1) Law Rep. 9 Q. B. 4.

(2) 1 Q. B. 66, at p. 75.

(3) 9 Ex. 111.

undoubtedly was that a court of limited jurisdiction cannot give itself jurisdiction by wrongly deciding a question collateral to the issue and the merits. But it seems to me that the question whether or not the land in this case formed part of the street was not collateral, but was the very essence, foundation, and merits of the case before the magistrate.

I am of opinion, therefore, that the magistrate had jurisdiction, and that this rule for a certiorari cannot be supported. I may point out that the applicant was not without remedy, because when the magistrate decided against him he could ask for a case under 20 & 21 Vict. c. 43, or appeal to quarter sessions, or appeal under s. 268 of the Public Health Act, 1875, to the Local Government Board. I offer no opinion upon the point decided by the Recorder of Sheffield.

Rule discharged.

Solicitors for applicant: *Geare & Son*, for *Wake & Sons, Sheffield.*

Solicitors for corporation: *Smith & Wilmer*, for *J. Yeomans, Sheffield.*

W. A.

FOAT *v.* THE MAYOR, &c., OF MARGATE.

April 27.

Local Government Acts—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 264—*Notice of Action—Action for Recovery of Land.*

Sect. 264 of the Public Health Act, 1875 (38 & 39 Vict. c. 55),—which enacts that no writ or process shall be sued out against any local authority for anything done or intended to be done under the provisions of the Act until one month after written notice of action, &c., and that any person to whom any such notice of action is given, may tender amends to the plaintiff within one month after the service of such notice—does not apply to an action for the recovery of land.

ACTION for the recovery of a house and land in Margate, Kent.

Defence, seventh paragraph, that the premises were acquired and entered upon by the defendants, as the urban authority of Margate, for the purpose of improving a street under the powers of the Public Health Act, 1875, and that the plaintiff did not, one month before action, serve a written notice upon the defendants as required by the Act.

Demurrer.

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H. D. Greene, for the plaintiff. The notice of action required by s. 264 of the Public Health Act, 1875 (1), is not applicable to an action for the recovery of the possession of land. Besides requiring notice in writing, the section enacts that every such action is to be commenced within six months of the accrual of the cause of action, and it cannot have been meant that so small a space of time should give a title to land wrongfully occupied. In *Flower* v. *Local Board of Low Leyton* (2) Jessel, M.R., held that the section did not apply to a bill for an injunction to restrain a serious or irreparable injury to property.

Prosser, for the defendants. *Flower* v. *Local Board of Low Leyton* (2) is distinguishable, for it was not an action in the ordinary sense of the term, but an application to the summary jurisdiction of the Court. Sect. 264 is general in its terms, and makes no exception in favour of actions for the recovery of land.

WATKIN WILLIAMS, J. I think this demurrer must be overruled. This is not an action of tort or for anything done under the provisions of the Public Health Act, 1875. I think, too, that the provision in s. 264—that any person to whom notice of action is given may tender amends within a month after service of the notice, and, in the event of non-acceptance, plead the tender in bar—shews that the section can only apply to some wrongful act for which compensation can be made in damages, and that it does not extend to an action for a wholly different kind of relief—the recovery of land.

(1) 38 & 39 Vict. c. 55, s. 264. A writ or process shall not be sued out against or served on any local authority, or any member thereof, or any officer of a local authority, or person acting in his aid, for anything done or intended to be done, or omitted to be done under the provisions of this Act, until the expiration of one month after notice in writing has been served on such local authority, member, officer, or person, clearly stating the cause of action, and the name and place of abode of the intended plaintiff, &c., and on the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the notice so served, and unless such notice is proved the jury shall find for the defendant.

Any person to whom any such notice of action is given may tender amends to the plaintiff at any time within one month after service of such notice, and in case the same be not accepted, may plead such tender in bar, &c.

(2) 5 Ch. D. 347.

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MATHEW, J. I am of the same opinion. The section in terms applies to cases where the plaintiff asks for compensation in money, and where it is in the power of the defendant to offer an equivalent for that which the plaintiff demands. An action for the recovery of land is something wholly different.

Judgment for the plaintiff.

Solicitors for plaintiff: *Noon & Clarke.*

Solicitors for defendants: *Duncan, Murton, & Co., for F. Kelcey.*

A. P. S.

EX PARTE COTTON.

June 28.

Bill of Sale—Bills of Sale Act, 1878, *Amendment Act*, 1882 (45 & 46 *Vict.* c. 43), s. 7—*Bill of Sale registered before the Commencement of the Act—"Reasonable excuse" for Non-production of Receipt for Rent—Relief against Seizure of Goods.*

The provisions of s. 7 of the Bills of Sale Act, 1878, Amendment Act, 1882, apply to goods seized after the date of the commencement of the Act under a bill of sale executed and registered before such date.

Where the grantor of a bill of sale did not, upon demand in writing by the grantee, produce a receipt for rent which had only become due a few days, and of which it appeared the landlord had not yet required payment:—

Held, that the grantor had not "without reasonable excuse" failed to produce his last receipt for rent, within the meaning of the 4th sub-section of s. 7 of the Bills of Sale Act, 1878, Amendment Act, 1882.

Where, after goods had been seized under a bill of sale for default in payment of instalments due thereunder, the grantor offered to pay the amount due, but the grantee refused to receive the same:—

Held, that the Court had power, under the above-mentioned section, to make an order restraining the grantee from selling the goods on condition that the amount due was paid.

APPEAL from the decision of Huddleston, B., at chambers.

The facts were as follows:—In the month of October, 1882, Cotton gave a bill of sale of the furniture, &c., on certain premises to one Simmons, who carried on business under the style of the Imperial Advance Bank, to secure a total sum, including interest, of 160*l.*, and the said bill of sale was duly registered in accordance with the provisions of the Bills of Sale Act, 1878, before the 1st of November, 1882. By the terms of the bill of sale the sum secured was to be payable by weekly instalments of 30*s.*, and it was provided that in case of non-payment of any of

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the instalments on the days appointed, and in certain other events, one of which was, if the grantor of the bill of sale should "fail to deposit with the grantee a receipt for rent due in respect of the premises," then the grantee might enter and seize and sell the goods for the whole amount secured by the bill of sale.

On the 9th of June in the present year, a sum of 5*l.* became due for rent from the grantor in respect of premises upon which part of the goods included in the bill of sale were. On the 11th of June one of the weekly instalments under the bill of sale became due, but was not paid. On the 13th of June the grantee wrote to the grantor reminding him that the instalment was due and unpaid, and stating that unless it was paid on the next day he should be obliged to seize and realise his security. By the same letter the grantee also asked the grantor to pay the rent due on the 9th of June, and to produce the receipt for the same. These requirements not being complied with, on the 19th of June the grantee seized and put a man in possession of the goods included in the bill of sale, a further instalment of 30*s.* having on the 18th become due and not having been paid.

On the 20th of June an application was made on behalf of the grantor to Huddleston, B., at chambers, for an order under the 7th section of the Bills of Sale Act, 1882, to restrain the grantee from removing and selling the goods. The learned judge made an order that the grantee should be restrained from so doing conditional upon the payment of the two instalments due by the grantor. It appeared that the landlord had not demanded or taken any steps with regard to the rent due. The grantor contended that under the circumstances there was a reasonable excuse for not producing the receipt. After the making of the order some person representing the grantor had an interview with the clerk to the grantee's solicitor, and stated that he had the amount of the instalments in his pocket and was ready to pay it over, but the clerk said that it had better not be paid pending the appeal proceedings. The grantee appealed against the order of the learned judge.

H. Kisch, for the appellant. The provisions of the 7th section of the Bills of Sale Act, 1882, cannot have been intended to be

retrospective, and do not apply therefore to bills of sale made and registered before the 1st of November, 1882, the date of the commencement of the Act.

Assuming, however, that the section is retrospective, the learned judge had no power to make the order that he did. To give the judge jurisdiction under the 7th section to restrain the grantee or to make any order, he must be satisfied that the cause of seizure has ceased to exist. He cannot make an order conditional on the possibility of the cause of seizure ceasing to exist in the future.

[Watkin Williams, J. The power to make the order is given to the court or a judge. The hearing of the appeal to us is in the nature of a re-hearing, and we can make the order if satisfied that the cause of seizure has now ceased to exist. There was an offer to pay the instalments on behalf of the grantor, but the grantee refused to receive them.]

There was nothing really amounting to a tender of the money. Also there was another cause of seizure which had not ceased to exist in any point of view, viz., the non-production of the last receipt for rent. The fact that the rent due has not been paid, and therefore there is no receipt, cannot be a reasonable excuse for its non-production. The condition in the bill of sale and the 4th sub-section of s. 7 of the Bills of Sale Act, 1882, imply that the rent must be paid on the day it falls due, and the non-production of the receipt for such rent in the absence of reasonable excuse is a cause of seizure.

The respondent in person.

Watkin Williams, J. This is an appeal from the order of Huddleston, B., made under the 7th section of the Bills of Sale Act, 1882. That section provides that the grantor of the bill of sale may, within five days from the seizure of any chattels on account of any of the causes mentioned in the section, apply to the High Court or a judge, and such court or judge, if satisfied that by payment of money or otherwise the said cause of seizure no longer exists, may restrain the grantee from removing or selling the said chattels, or may make such other order as may seem just. The learned judge made an order under this section

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conditional on the grantor paying the sum of 3*l.*, the amount of two instalments due under the bill of sale. From this order the grantee appeals. It seems to me that this is really a rehearing of the case before us, and we are not driven to inquire with too great exactness into the question whether the order of the judge was justified at the time it was made. The question is what order ought to be made to-day. The facts are these: In the present month, viz., on the 11th of June, an instalment of 1*l.* 10*s.* became due under the bill of sale, and a further instalment of 1*l.* 10*s.* became due a week later. On the 13th of June the grantee wrote to the grantor and demanded the production of the receipt for rent, and, on the ground that those instalments were due and unpaid and that the receipt was not produced, he subsequently seized and took possession of the goods under the bill of sale. Under those circumstances the grantor applied to the judge at chambers by summons asking for relief under the statute, and the judge made the order which is now appealed against. On this appeal several objections to the order have been taken on behalf of the appellant. It is first objected that the provisions of the Bills of Sale Act, 1882, s. 7, do not apply to this case, because this bill of sale was executed and registered before the Act came into force. I have come to the conclusion that the section does apply to this case. It does not appear to me that this involves holding that the section is retrospective as was contended. I do not say that its provisions were meant to apply to seizures made before the Act came into operation. But, in my opinion, it clearly applies prospectively to all goods seized under bills of sale after the coming into operation of the Act.

Now that being so, is this a case in which, under the provisions of the section, an order ought to be made relieving the grantor of the bill of sale against the seizure? One ground of the seizure is the non-production of the receipt for rent. There is, as I understand it, nothing in the bill of sale, nor is there anything in the statute in terms authorizing the seizure of the goods for non-payment of rent or because rent is in arrear. It is argued that the provision, which entitles the grantee to seize if the grantor shall not produce the last receipt for rent, amounts in substance to a condition that the rent shall not be in arrear. I think the

provision means what it says, viz., that the tenant must produce the last receipt for rent if there is no reasonable excuse for not doing so. It seems to me, where a landlord is not in the habit of demanding his rent at the moment it falls due, as, for instance, in the case of agricultural leases, in which case it is the common practice not to insist on the payment of the rent till the rent-audit day, and nobody ever does pay his rent till that day, that, if in such a case a demand is made for the production of the receipt for rent, e.g., for the production of the receipt for the Michaelmas rent on the 1st of October, and the tenant says that he cannot produce the receipt because he has not paid the rent, and it is not usual to pay it till the rent-audit day, that would be a reasonable excuse within the statute. I do not think, when a man does not produce the receipt, the time not having come at which, in the ordinary course of things, he would be called upon to pay his rent, it can be meant that there is to be instantly a forfeiture under the bill of sale on the ground that he has, without reasonable excuse, failed to produce the receipt. It seems to me that the non-production of the receipt in this case is not shewn to be a non-production without reasonable excuse under the 7th section of the Bills of Sale Act, 1882. The landlord does not seem to have asked for the rent, and there is nothing to shew that the time had come at which, in the ordinary course of things between him and the tenant, the rent would be paid. Then, with regard to the other cause of seizure, viz., the non-payment of the instalments, the question is whether such cause of seizure any longer exists. It is urged that until the instalment is actually paid the cause of seizure continues to exist. But if after the seizure the grantor of the bill of sale comes for the express purpose of paying the instalment due, and begs the grantee to receive it and withdraw from possession, and the grantee refuses, I think that in such a state of things the cause of seizure would have ceased to exist within the meaning of the section. If the grantor is ready to pay and wishes to pay, and is only prevented from so doing because the grantee will not take the money, I think there is no longer any cause for the seizure. I think that in effect that is what has occurred here. It seems to me that the grantor was prepared to pay these instalments, but the grantee

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said that it was no use, as he should not withdraw even though they were paid. After that statement it would have been an idle form to tender the money. Under these circumstances it seems to me that the cause of seizure has ceased to exist, and that the proper order for us to make is that, upon the grantor's paying the instalments now due, the grantee be restrained from selling or removing the goods.

A. L. SMITH, J. The real question here is whether, under the circumstances, the grantee of the bill of sale is entitled to sell the goods. It was argued, in the first place, that, the bill of sale having been given and registered before the coming into operation of the Bills of Sale Act, 1882, the provisions of that Act did not apply to the seizure of goods under such a bill of sale. I do not agree with this contention. By the 3rd section of the Act it is provided that "unless the context otherwise requires" the Act "shall not apply to any bill of sale duly registered before the commencement of the Act, so long as the registration thereof is not avoided by non-renewal or otherwise." The question therefore arises whether the context, in the case of s. 7, does "otherwise require." Now the 13th section of the Act provides that "all personal chattels seized after the commencement of this Act under any bill of sale, whether registered before or after the commencement of the Act, shall remain on the premises where they were so seized, and shall not be removed or sold until after the expiration of five clear days." What is the object of that provision? Clearly the object is to give the grantor an opportunity of applying to a judge at chambers within those five days, for relief against the seizure, under the provisions of s. 7, which is the section under which the application was made in the present case. Inasmuch as the provisions of s. 13 expressly relate to bills of sale registered before the commencement of the Act, and the object of that section is to give an opportunity for proceedings under s. 7, it seems clear to me that the provisions of s. 7 apply to seizures under bills of sale registered before, as well as seizures under those registered after, the commencement of the Act. That being so, the question is whether the learned judge was right in making the order that he did.

It appears that on the 9th of June, 1883, 5*l.* became due from Cotton for rent of the premises, but the landlord does not appear to have asked for that rent or to have taken any steps with regard to it; and there is nothing to shew that he had expected or required that it should be paid at the date of the hearing before the learned judge. But on the 11th of June, 1883, a weekly instalment of 30*s.* became due, and thereupon on the 13th of June the grantee of the bill of sale wrote to Cotton stating that the instalment was due, and that unless it was paid by the next day he should seize and realise his security. The letter also called upon Cotton to pay the rent due in respect of the premises, and to produce the receipt for it. Upon the failure to comply with this requirement the grantee grounds his allegation that the grantor has without reasonable excuse failed to produce his last receipt for rent. The landlord had never asked for the rent, and I do not see what right the grantee had to require the grantor to pay the rent; the statute certainly gives none. On the 18th of June another instalment of 30*s.* fell due, and was not paid, and upon the 19th the seizure under the bill of sale took place. On the 20th the case came before Huddleston, B., at chambers. He ordered that on payment of 3*l.* the grantee should be restrained from selling. I think that order was right. It is argued that he could not make the order because at the time of making it he could not legally be satisfied that the cause of seizure had ceased to exist. What were the alleged causes of seizure? Two only; one that Cotton had without reasonable excuse failed to produce his last receipt for rent, the other the non-payment of the instalments. With regard to the former, can it be said that he had without reasonable excuse failed to produce the receipt? I think not. The landlord had never asked for the rent, and I think it is a misreading of the 4th sub-section of s. 7 of the Bills of Sale Act, 1882, to say that it means that the grantee shall be entitled to seize wherever the grantor has not paid his rent on the very day it became due. The sub-section says nothing about non-payment of rent as a condition of the right to seize. The condition mentioned by the section is non-production of the last receipt for rent without reasonable excuse. Here the rent is not yet paid, a very short time having elapsed since it fell due,

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and the landlord has not asked for it. The receipt is not produced, because the grantor not having yet paid the rent has not got one: I do not think that under these circumstances there was a failure to produce the receipt without reasonable excuse. Then there remains the question with regard to the instalments. The words of the section are, "if satisfied that by payment of money 'or otherwise' the cause of seizure no longer exists." Therefore it is not by payment of money only that the cause of seizure may cease to exist. If the judge is satisfied that the money is forthcoming and will be immediately paid, he may I think be satisfied that the cause of seizure has ceased to exist. Here it would appear that before the learned judge the grantor stated that he was ready and willing to pay the instalments, and thereupon the judge ordered that on such payment the grantee should be restrained from selling the goods. It seems to me that the learned judge had power to make the order, but, if I am wrong in this view, then I think that this is a rehearing, and if we are satisfied now that the cause of seizure no longer exists, we are entitled to make the order. On the evidence before us I think the grantor was ready and willing to pay the instalments, because it appears that since the order of Huddleston, B., a person went to the grantee's solicitor and stated that he was prepared on the grantor's behalf to pay the money, but the grantee's solicitor refused to take it pending these proceedings.

It seems to me that under these circumstances the proper order to make is that the appeal must be dismissed and the order affirmed, on condition that the instalments now due are paid. (1)

Order accordingly.

Solicitors for grantee: *A. A. Abrahams & Co.*

(1) Another instalment had become due in the meantime, and after some discussion it was ultimately ordered that the order of the learned judge should be affirmed, on condition that the amount of the three instalments were paid by noon on the succeeding day.

E. L.

THE QUEEN *v.* WHITE AND OTHERS.

1883
June 21.

Poor Law—Overseers of Parish—Bill in Parliament affecting Parish—Opposition by Overseers—Costs of Opposition.

A bill before Parliament provided for the punctual payment of interest on the share capital of the undertaking, for which authority was sought by declaring that the overseers of the parish in which such undertaking was situated should, when required so to do, raise as part of the poor-rate money for the payment of such interest. The overseers opposed the bill, which was rejected by a committee of the House of Lords. On an application for a writ of certiorari to bring up and quash the certificate of the district auditor allowing the taxed costs of such opposition:—

Held, that there was no duty on the part of the overseers to oppose the bill, and that they were not entitled to charge the costs of the opposition on the poor-rate.

In this case a rule nisi for a writ of certiorari was obtained on behalf of Thomas Sibly, a ratepayer of the parish of St. George in the Barton Regis Union, in the county of Gloucester, to remove into this Court the certificate of allowance made on the 19th of December, 1882, by G. S. White, the auditor of the Gloucestershire Audit District, whereby he allowed the sum of £327 14*s.* 8*d.*, being the amount of a duly taxed bill of costs of the solicitor employed by the overseers of the parish for opposing in Parliament in the session of 1882 a bill intituled the Bristol Port and Docks Commission Bill.

The material facts were as follows:—

On the 18th of December, 1881, the bill in question was deposited. On the 30th of December, 1881, notice for convening a vestry meeting of the parish of St. George was given by the churchwardens and overseers thereof, and pursuant thereto, on the 10th of January, 1882, a vestry meeting was held, at which it was resolved that the bill should be opposed, and that the overseers should take such steps and incur such expense as they might think necessary. The overseers thereupon did oppose the bill in Parliament, and obtained its rejection, and incurred therein costs amounting to £327 14*s.* 8*d.* The bill, amongst other provisions, contained the following clause.

"76 (1). If the commission (meaning thereby the commission

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incorporated by the bill) at any time find that they cannot have at their immediate disposal, under their borrowing powers or otherwise, funds sufficient to provide for the punctual payment of the whole of the interest on the consolidated stock on the day appointed for payment of the same, they shall at such time before that day as will enable provision for such punctual payment to be made in manner after mentioned issue precepts to the corporation and to the Barton Regis guardians and to the Bedminster guardians respectively, requiring each of such bodies to pay within a specified time to be named in such precept the amount therein mentioned as payable by such body.

"(2). It shall be the duty of each of such bodies to comply with the requisitions of such precept by paying the sums mentioned out of any moneys in their hands, or by levying the amount required, in the case of the corporation as part of the borough rate, and in the case of the guardians as part of the poor-rate leviable in the portions of their respective unions comprised in the dock-rate area exclusive of the city.

"(3). If default is made in payment by any of the said bodies of the sums required to be paid by them in pursuance of this section, the amount in default shall be deemed to be a debt due to the commission from the defaulting authority, and to be enforced at the instance of the commission by mandamus.

"(4). The amount payable by each of the said bodies shall be calculated by the commission in proportion to the rateable value of the city and of the portions of the said unions comprised in the dock rate area exclusive of the city, according to the valuation list for the time being in force, or if there is no valuation list, then according to the last rate for the relief of the poor."

The reasons given by the auditor for the allowance which he made were as follows:—

"Because it was proposed by the bill to take power to charge the poor-rate of the parish, and to impose other or additional rates on property within the parish, which in the opinion of the parish officers would injuriously affect the value of property therein; it was their duty as trustees to oppose such bill, and that they were justified, having acted on the opinion of solicitor and counsel, in applying the funds in their possession (raised by

rates) in opposing such bill, which was thrown out by the Lords' committee." (1)

June 14. *Charles, Q.C.*, and *Pitt Lewis*, for the auditor, shewed cause. The duty of overseers is to levy a competent sum for the relief of the poor according to the ability of the parish, 43 Eliz. c. 2, s. 1. This bill would have altered the ability of the parish to bear the burden of a poor-rate, and the rights and duties of the overseers in respect of the poor-rate would be altered by the imposition of new duties on them: thus they had both direct and indirect interests in opposing this bill: *Bright* v. *North* (2); *Attorney General* v. *Mayor of Brecon.* (3)

Petheram, Q.C., and *W. F. Barry*, for the guardians.

Wills, Q.C., and *A. Glen*, in support of the rule. A body corporate is entitled to use its funds to protect the corporate interest or property, but there is nothing analogous to this in the case of overseers. They are chosen for a fixed period, and their duties are to collect a fund and distribute it according to law. They may protect the funds they are in possession of at the expense of the ratepayers, but they cannot go beyond that and take upon themselves matters which affect property in the parish and in which the owners of property and not the overseers are interested. The law as to parochial expenditure must be administered scrupulously: *Rex* v. *Stewart.* (4)

Cur. adv. vult.

June 21. A. L. SMITH, J., delivered the judgment of the Court (Williams and A. L. Smith, JJ.), and after stating the facts as above set out, continued:—

The question now raised before us is whether this is an expenditure which the overseers were legally entitled to make, or in other words, whether it is an allowance which could in point of law be made. It was insisted on behalf of the overseers that the provisions of the bill cast upon the ratepayers an additional burden, inasmuch as it provided for the taking of more money out of the parish than otherwise would have been the

(1) This statement of facts is taken from the written judgment of the Court.

(2) 2 Ph. 216.

(3) 10 Ch. D. 204.

(4) 12 Ad. & E. 773.

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case and thereby might exhaust the ability of the parish to pay rates; that it affected the poor of the parish, inasmuch as it diminished the rateable capacity of the parish; that it cast an additional duty upon the overseers themselves, viz., that of making an additional levy for the purposes of the bill, and that thereby "rights, privileges, and duties" of the overseers within the meaning of the case hereinafter referred to were directly attacked; that by statute 43 Eliz. c. 2, s. 1, the overseers of the poor were to raise weekly or otherwise by taxation of every inhabitant and of every occupier in such competent sums for and towards the necessary relief of the poor to be gathered of the parish according to the ability of the same; that the overseers as trustees for the poor, either by reason of the provisions of the statute itself, or if not by the direct authority thereof, at any rate as incident to the powers thereby conferred, were entitled to defend themselves from the proposals made by the Bristol Port and Docks Commission Bill, and to expend moneys derived from the poor-rate in opposing the same. If it could be established that the overseers were trustees as suggested, and that rights, privileges, and duties similar to those dealt with by the Lord Chancellor in *Bright* v. *North* (1), and by the late Master of the Rolls in *Attorney General* v. *Mayor of Brecon* (2), were being attacked, we are of opinion that those cases are authorities for the proposition put forward on behalf of the overseers, and indeed this was not disputed at the Bar. We are however of opinion that the overseers wholly fail in point of fact.

In the first place no trust is imposed upon them to maintain the ability of the parish to pay rates, and even if there were, the duty to maintain the ability of the parish to pay rates is wholly dissimilar from the duty which existed in the case of *Bright* v. *North* (1), viz., to maintain the stability of the banks. Overseers (though a quasi-corporation for some purposes not material to this case: *Gouldsworth* v. *Knights* (3)) are officers annually, or, as in this case, triennially appointed; their duty is to keep the parish books, to make up proper accounts, to collect

(1) 2 Ph. 216. (2) 10 Ch. D. 204.
(3) 11 M. & W. 337.

the required rate, and to hand over the proceeds to the proper persons. They have not even the ordinary governing or directing of relief to the poor—that appertains to the guardians: 4 & 5 Wm. 4, c. 76, s. 54. They (the overseers) have nothing whatever to do with maintaining the ability of the parish to pay the required rate. An overseer is, as stated by Lord Denman, C.J., in *Reg.* v. *Stewart* (1), a statutable officer dealing with a statutable fund and accountable for its application to statutable purposes. If the contention of the overseers in this case is well founded they would be entitled to expend the moneys of the poor-rate in opposing every local or other scheme which might tend to alter, lessen, or interfere with the rateable value of the parish. As to the suggestion that their own duties may be varied by the Bristol Port and Docks Commission Bill in having to make an additional levy on that behalf, we are of opinion that such cases are not within either of the decisions cited.

In our judgment neither by the statute of Elizabeth nor by any powers incident thereto were the overseers entitled to oppose the bill in question and charge the costs of such opposition upon the poor-rate, that they have no "rights, privileges, or duties" within the meaning of the two cases cited, and inasmuch as it was not contended that any right to property was sought to be attacked, we are of opinion that the rule must be made absolute with costs against the overseers.

Rule absolute.

Solicitors for applicant: *Merediths, Roberts, & Mills, for Sibley & Dickenson, Bristol.*

Solicitors for defendants: *Warry, Robins, & Co., for J. H. S. Dix, Bristol; Gregory & Co., for Benson & Carpenter, Bristol.*

(1) 12 Ad. & E. 773.

A. M.

1883
April 27.

[IN THE COURT OF APPEAL.]

THE QUEEN (on the Prosecution of the Guardians of the Poor of Madeley Union) *v.* THE GUARDIANS OF THE POOR OF BRIDGNORTH.

Poor—Removal of Pauper Wife and Children—Settlement—Derivative Birth—Divided Parishes Act, 1876 (39 & 40 *Vict. c.* 61), *s* 35.

An order for the removal of a pauper wife and her three children, aged respectively five years, three years, and one year, on the ground that the settlement of her husband was the birth settlement of his father within the union to which the removal was made, having been made and appealed against, the birth settlement of the husband's father in such union was proved, but no other settlement either of the husband or of his father being set up, the order was quashed by an order of the Court of quarter sessions and the Queen's Bench Division confirmed such order of the sessions:—

Held, affirming the decision of the Queen's Bench Division, that evidence of the settlement of the husband's father was inadmissible, and could not be acted upon in making the order of removal, as it went to prove the derivative settlement of the parent of the children contrary to s. 35 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), and that consequently the order of removal was rightly quashed.

Appeal by the guardians of the Bridgnorth Union from the decision of the Queen's Bench Division on a case stated by the Recorder of Bridgnorth, and which is fully set out in the report in the Queen's Bench Division (1).

An order of the justices for the borough of Bridgnorth was made for the removal of Ellen Hughes and her three children, aged five years, three years, and one year respectively, from the Bridgnorth Poor Law Union to the Madeley Poor Law Union. The grounds of such removal were alleged to be that the settlement of William Hughes, the husband of Ellen Hughes and the father of the children, was the birth settlement of his father John Hughes, who was born in the parish of Madeley in the Madeley Union in the year 1822, and acquired no settlement in his own right. On an appeal from such order of removal to the borough quarter sessions, the guardians of the Madeley Union called no evidence at the close of the case for the Bridgnorth Union guardians, but submitted as a matter of law that it was

(1) 9 Q. B. D. 765.

not sufficient for the Bridgnorth Union guardians to prove, as it was admitted they had, the place of birth of John Hughes, but that unless they could shew affirmatively a legal settlement of John Hughes at Madeley not derived from the fact of his birth there, his son William Hughes must be held to be settled in the place in which he was born.

The recorder quashed the order of removal on the ground that it was in law insufficient to make out a primâ facie birth settlement for John Hughes, and that as the Bridgnorth Union guardians had not established any other than such primâ facie birth settlement, William Hughes must be held to be settled in the parish of his birth by virtue of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61) (1).

The Queen's Bench Division having affirmed the order of the sessions quashing the order of removal, the Bridgnorth Union guardians appealed.

Jelf, Q.C., and *Spearman*, for the appellants. The Queen's Bench Division had not, nor has this Court, power to decide any matter of law except upon the questions submitted by the quarter sessions. The Queen's Bench Division wrongly entertained the question upon which they have given judgment, they have not answered the question put to them; which was, whether the facts proved established a settlement for William Hughes in Madeley.

[COTTON, L.J. The Queen's Bench Division exercises a control over the quarter sessions: the jurisdiction is not merely consulta-

(1) By 39 & 40 Vict. c. 61, s. 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father, or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent, without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

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tive, per Lord O'Hagan in *Overseers of the Poor of Walsall* v. *London and North Western Ry. Co.* (1).]

[BOWEN, L.J. The Court of Appeal ought not to be asked to answer a question of law, which arises only upon a wrong assumption of the law.]

If the case had proceeded at the sessions it might have been proved that William Hughes was born within Madeley Union.

But it is clear that the pauper Ellen Hughes and her children are removeable to Madeley Union; for they follow the settlement of William Hughes, who took his father's settlement: *Great Yarmouth* v. *City of London* (2); *Reg.* v. *Guardians of Hereford Union.* (3)

[BRETT, M.R. The difficulty arises from the fact that William Hughes's settlement has not been proved.]

If William Hughes had become chargeable, he would have been removeable to his father's settlement, which was Madeley Union; it could not have been intended to separate a mother from her children or a wife from her husband.

[BRETT, M.R. The question in this case depends upon the construction of s. 35 of the Divided Parishes Act, 1876.]

That section is divided into three clauses. The case of a child under sixteen is excepted in the first clause from being prevented from deriving a settlement from its parent. The last clause refers only to a child who has become an independent unit. In the Queen's Bench Division the judges thought themselves at liberty to disagree from *Guardians of Hollingbourn* v. *Guardians of West Ham.* (4)

[BOWEN, L.J. What is the meaning of the words, "in this section mentioned," in the beginning of the last clause of s. 35? The construction now contended for gives no meaning to them.]

The effect of the decision in the Queen's Bench Division will be that the father will be separated from his children; but that result is contrary to the policy of the law; 9 & 10 Vict. c. 66, s. 3, expressly forbids the removal of a child apart from its father.

The contention for the respondents will, if adopted, cause a complete break up of the family; the pauper, Ellen Hughes,

(1) 4 App. Cas. 467.
(2) 3 Q. B. D. 232.
(3) 43 J. P. 335.
(4) 6 Q. B. D. 580.

must go with her husband to his place of settlement, and the three children must go to the places where they were respectively born; these children are under the age of seven years and within the age of nurture; therefore they cannot be lawfully separated from their mother: *Rex* v. *St. Nicholas, Leicester* (1); *Reg.* v. *Birmingham* (2); *Guardians of Salford* v. *Overseers of Manchester*. (3) This is a manifest legal absurdity, which ought to be avoided. If William Hughes were to become chargeable, he would go to his father's place of settlement, and surely all the members of his family ought to accompany him; there cannot be two places of settlement. The decision in *Woodstock Union* v. *St. Pancras* (4) proceeded upon different facts; it is not a case in point. *Westbury-on-Severn* v. *Barrow-in-Furness* (5) merely decides the question whether s. 35 is to be read retrospectively. Sect. 35 is to be read subject to the overriding rule, that a mother shall not be separated from her children; the third clause of that section may be read as applying only where the settlement of the children is to be inquired into and ascertained, after they have been emancipated and are living apart from their parents.

Bosanquet, Q.C., and *R. L. Kenyon*, for the respondents.

[BRETT, M.R. We all think that the real question which we are to consider is whether the evidence as to John Hughes's birth-place was admissible.]

It was not admissible. The 35th section of the statute prevents such evidence being received and acted upon, for it would be inquiring into the derivative settlement of William Hughes, which that section says shall not be done. When the person whose case you have to consider is a child under sixteen it is the same as it was under the old law, and is excepted by this enactment. Such child takes the settlement of its parent, but there such derivative settlement stops, and you cannot inquire into the derivative settlement of the parent.

Only two kinds of derivative settlement are known to the law, parentage and marriage; the word "estate" in s. 35 seems to have been inserted by mistake. No doubt s. 35 is hard to

(1) 2 B. & C. 889.
(2) 5 Q. B. 210.
(3) 10 Q. B. D. 172, at p. 175.
(4) 4 Q. B. D. 1.
(5) 3 Ex. D. 88.

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construe, and the construction relied upon by the respondents may possibly lead to the result that the children will be separated from their mother. A married woman will take her husband's settlement; but if that cannot be proved, and if he is dead, she must be treated as if she were an unmarried woman, and if he is alive she will remain in the parish where she is resident. The 3rd clause of s. 35 was passed with the view of giving a child an independent settlement, even although that involves a separation from its mother.

[BRETT, M.R. The difficulties as to the construction of s. 35 may be surmounted by holding that it does not extend to children who are living with their mother.

BOWEN, L.J. It may be that a child under sixteen does not come within the abolition of derivative settlements.]

The case of *Great Yarmouth* v. *City of London* (1) is distinguishable, as it related to the case of a wife who by the express exception in the 35th section is to derive her settlement from her husband. It is true that the Court there inquired into the derivative settlement of her husband, and if that cannot be distinguished on the ground suggested it was wrongly decided and ought to be overruled. The same may be said as to *Guardians of Hollingbourn* v. *Guardians of West Ham.* (2) In that case Lindley, L.J., then Lindley, J., considered that the first part of s. 35 involved the assumption that the child mentioned in that first part had a father or widowed mother who was alive, and he considered that the third part of that section applied to children under sixteen not falling within the first part, that is to say, not having a father or mother alive, and to illegitimate children whether under or over sixteen. But the third part is very general, and says, "if any child in this section mentioned," and the consequence of such enactment is, if any such child has not acquired a settlement for itself, and the settlement of its father cannot be shewn without going into his derivative settlement, the child is to be deemed settled where it was born. It is said that the children in the present case are not within that third part because that third part is merely matter of procedure, and is applicable only where there is an independent inquiry as to the derivative

(1) 3 Q. B. D. 232. (2) 6 Q. B. D. 580.

settlement of the parent in order to find the settlement of the child. That is not so; that third part is not a matter of procedure at all, but one which affects the status in life of the person. No doubt if the settlement of the parent is established or admitted, no inquiry will be made into how it was acquired, whether it was a derivative settlement or not, and the child if under sixteen will by force of the exception in the first part of the section take the settlement of its parent, but William Hughes cannot be brought within that exception unless he can be considered to be "a child" within the meaning of that exception, and unless he be such the appellants must fail to make evidence of his derivative settlement admissible.

Jelf, Q.C., replied.

BRETT, M.R. In this case an order of removal was made by the justices for the removal of Ellen Hughes and her three children, aged five years, three years, and one year respectively, from the Bridgnorth Poor Law Union to the Madeley Poor Law Union. That order was brought by way of appeal to the quarter sessions before the recorder, and it was there objected to on the ground that it was founded upon evidence of the settlement of John Hughes, the grandfather of the children, the father of the husband of Ellen Hughes. Upon that the recorder quashed the order of removal, but stated a case, and it seems to me that the question which has arisen, and which in truth is the only question we have to decide, is this, Was it right in making such order of removal to have received and acted upon the evidence of the settlement of John Hughes? There is no doubt that that question raises this question, What is the proper construction, with regard to that point, of s. 35 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61)? In order to arrive at the true construction of the section with regard to that point one would have been glad to have been able to understand every part of it, but after the most strenuous efforts to do so, and notwithstanding the great ability with which the case has been argued by the counsel on either side, I confess my inability, and I do not pretend, to understand every part of that section.

However I have come to the conclusion that I understand it to

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this extent, that in no case of making an order of removal after the passing of that statute is it possible to say that it is right to inquire into the settlement of the grandfather of the children or of the father of the husband of the woman, and if such cannot be a proper matter of inquiry in any case, of course it was not in this case, and consequently to the question asked of us we have but to answer that it was not, and that therefore the recorder was right in quashing this order of removal, and the Queen's Bench Division was right in affirming his decision. I think it was admitted by Mr. Jelf, notwithstanding all the subtlety with which he argued the case, that he could not maintain his point unless we were prepared to say that the word "child" in that 35th section comprises everybody who has been a child. When the case is put to me thus, I have not the least doubt that the word "child" in that section is not to be so construed. The section begins abruptly thus: "No person shall be deemed to have derived a settlement from any other person." There is no introduction, to say whether that is with regard to the law of removal or not, and it is obvious that one must apply the necessary introduction, and it will then read thus: "In any question of the removal of a pauper no person shall be deemed to have derived a settlement from any other person." It seems to me that the person there meant is the person whose removal is in question. "No person" there consequently is the pauper, and if that stood alone, and if there were no exception, it would be that wherever there is question of the removal of a pauper no such pauper shall be deemed to have derived a settlement from any other person. But then this section goes on to say, "Whether by parentage, estate, or otherwise, except in the case of a wife from her husband." The wife, if she had been the person whose removal was in question, would have come within the term "person" at the beginning of the section. "No person shall be deemed to have derived a settlement from any other person whether by parentage, estate, or otherwise." "Estate" is a large word, and certainly includes "marriage," so the section must read, "whether by parentage, *marriage*, or otherwise, except in the case of a wife from her husband." Now that seems to me to shew that in the case where the

question is as to the removal of a wife she may derive a settlement from her husband. There it stops. Then the section goes on with a further exception, "And in the case of a child under the age of sixteen." A child over sixteen, therefore, is not excepted, and this section must be read that in the case of a question as to the removal of a child under sixteen such "child shall take the settlement of its father or of its widowed mother." Just in the same way as in the case of a wife you were shut down to the settlement of the husband, so here you are shut down to the settlement of the father or of the widowed mother, as the case may be. Now if the matter had stopped there it seems to me that in the case of any one over sixteen, I was going to say that person, but I will say that creature, not being within either of the exceptions, would have been within the expression "no person" used at the beginning of the section, and whenever his removal was in question you would be confined by that section to saying that that person shall not be deemed to have derived a settlement from any other person, but by the clause afterwards put in (I agree oddly, and perhaps during the passing of the enactment), it is enacted that this creature over sixteen, and therefore not within the exception, "shall retain the settlement so taken until it shall acquire another." What is the settlement so taken? It is a settlement from the father, or from the husband, or from the widowed mother; but it goes no farther, and it does not entitle you any more than the other exceptions did to go to the grandfather or to the husband's father. One wanted to see what was the meaning of what we have called the third part of this 35th section, but I confess I cannot see it, or to what it applies. I can, however, see that it does not enable you to go to the settlement of the grandfather, but that on the contrary, it shuts you off again at the father, or even at less than the father, because it provides for a case where "it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent," and therefore it forbids one to inquire into the derivative settlement of such parent. If I may state my present view of that third part of the section I incline to think that it applies to the case of a child over

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sixteen who has to be removed, and where, as the settlement of the father cannot be inquired into, it cannot therefore be shewn what settlement the child retains; and that where the circumstances are such that under the old law one would have been obliged to go to a derivative settlement, this enactment shuts you off from a derivative settlement in those cases, and says that such child or female who is thus to be removed is to be deemed to be settled in the parish in which he or she was born. Therefore in no case under the first or third part of the section, and certainly in no case under the second part of it, can you ever go beyond the father or the husband of the person who is to be removed. You never can go to the father of the husband or to the grandfather of the child.

The question before us in this case is whether evidence of the settlement of the grandfather of the children who were to be removed was admissible. In my opinion, for the reason I have given, it was not, and therefore this question should be answered by saying that such evidence was not properly admitted, and that therefore the recorder was right in quashing the order of removal. What effect this judgment may have on other questions, such as the removal of a mother with her children, or the removal of children who are in a state of nurture, it is not for me to say at present, neither is it necessary to solve the many questions which were raised during the argument for the purpose of trying to get at the interpretation of this enactment. It is not necessary to solve the question of what will become of this woman or of these children if by shutting out any inquiry as to the settlement of the grandfather you cannot prove the settlement of the father. The question as to what is to be done in such a case is not raised at present, and therefore it is not the subject-matter of our decision. Whether, assuming the evidence to be that the husband is alive, but there is an incapacity to prove what is his settlement, and whether the mother and children are to remain where they are, or whether they are to be removed elsewhere, or whether they can be separated or not, are all questions which it is not necessary to decide in this case, and I give no opinion upon them. I have given my view of what is the construction of the Act of Parliament with regard to the point before us. If that

view is inconsistent with any case which has been hitherto decided, then of course, sitting as I do in the Court of Appeal, I say I cannot agree with it, and therefore consider it was not properly decided.

COTTON, L.J. I am of the same opinion. The question that we have to answer, in determining whether this order of removal ought to be quashed, is whether the facts admitted and proved established a settlement of William Hughes in the parish of Madeley. The only evidence to make out a settlement was the fact that John Hughes, the father of William Hughes, had been born there, that is to say, by proving a derivative settlement. If the true construction of the Act of Parliament be, as I think it is, that evidence of derivative settlement cannot be given, and that the derivative settlement cannot be entered into, then the order for removal was wrong. The 35th section begins by a general clause: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another. An illegitimate child shall retain the settlement of its mother until such child acquires another settlement." What has been done here was to hold that William Hughes derived a settlement from his father, and to inquire into his derivative settlement. That is prohibited by the clause in the Act of Parliament, unless it can be shewn that there is something in the exception which follows, which enables that derivative settlement to be inquired into: What, then, is the exception as to the wife? It is not that when the question of a wife's settlement is considered, the previous enactment is altogether to be disregarded, but, as I understand it, in the case of a wife, when her removal is under consideration, she shall derive a settlement from her husband. It goes no further, and it does not in any way enable her husband's derivative settlement to be entered into. And then the section says: "And in a case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as

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the case may be." That would seem not in any way to remove the restriction as to going into derivative settlement, except as regards the child whose case is under consideration, and I will consider presently whether it is to be restricted to the consideration of a case of a child who is under the age of sixteen. The argument of Mr. Jelf really is this, that the derivative settlement of William Hughes could be entered into because William Hughes was once a child, and the Court may consider what settlement he had when he was a child. In my opinion it would be using forced language to say that one can consider William Hughes, who is now the father of a family, as coming under this exception, which is pointed, in my opinion, only to those who can properly be called children at the time when the question arises as to their removal. It would be a straining of English language to hold that William Hughes could at this time be said to be a child within the meaning of this Act. In my opinion it cannot possibly be right, according to ordinary English language, to say that a man of fifty or sixty, both of whose parents were dead, and who was the head of a family instead of a child, could be considered as a child within the meaning of this Act of Parliament. If that argument were right, it would be in effect to repeal the enactment that no person shall be deemed to have derived a settlement by parentage, and would entirely, as far as I can see, render that enactment inoperative, and, as I do not see at what step of the pedigree you could stop, introduce all the difficulties and expense which arise from the question of a derivative settlement being entered into. It is true, I think, although it is not necessary here to decide it, that a child may derive its settlement from its father, even though it is not under sixteen. That I think will appear from this, that the first as well as the third part of the section deals with children who are not under sixteen. Whether such third part extends to children under sixteen, it is unnecessary here to decide, but undoubtedly it applies to children who are above sixteen, and it contemplates that they shall derive their settlement from the father, but it also clearly shews that, in the opinion of the Legislature, the derivative settlement of the father should not be inquired into. It considers that that has been already provided for, and therefore it helps, in my opinion, the construction which I have put upon

the previous part of the section. It says what shall be done if "it cannot be shewn what settlement such child or female derived from the parent" (it assumes that can be entered into) "without inquiring into the derivative settlement of such parent." It does not say that such derivative settlement shall not be entered into, because it assumes that the power of inquiring into the derivative settlement has been already taken away by the first part of the section, and it says what is to be done in that case as regards fixing the settlement of the child, namely, that it is to be the place of its birth. That, in my opinion, is the true construction of this section as regards the right of going into the derivative settlement of William Hughes. In my opinion the Act of Parliament takes away that power, and therefore this order was rightly quashed. I cannot but see that the opinion which we have formed on this section is inconsistent with certain cases that have been cited. In some of them the point does not seem to have been much discussed, and in none of them to have been so fully discussed on the lines on which this case has been argued, and, notwithstanding the respect I entertain for the learned judges who decided them, I can only say that I am bound to express a different opinion to that which they have held.

BOWEN, L.J. I am of the same opinion, and on the construction of the Act I agree with what has been said by the Master of the Rolls and Lord Justice Cotton. I will only add one word about the way in which this question comes before us. I am not sure that the recorder had got before him the point of law exactly as we have had it discussed. I am not certain that he framed his question correctly; but I am confident that in whatever way he framed his question and decided this case, it would be absolutely necessary for him to decide, for good or evil, the construction of this enactment, and I think it would be idle for us to be led aside from giving judgment on the real effect and construction of the statute by a suggestion that the recorder may not have put the question, which certainly arises upon this case, in the right way. Being against Mr. Jelf on the construction of the statute, if we were to be embarrassed by his argument about the form of the case, one would be really either attempting to answer an

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impossible question, or else we should have to go through the form of sending back the case to be restated by the recorder to come back again with exactly the same point of law as we are about to decide. I have no hesitation in saying that the Court ought, as we do, to break through all those technicalities if they exist, and decide on the construction of the Act and the validity of the order of the Court of Quarter Sessions.

As I have before said, I agree in the construction put upon the 35th section by the Master of the Rolls and by Lord Justice Cotton. The first clause of that section destroys, in my opinion, the possibility of receiving the evidence of the settlement of the grandfather of the children or of founding any order upon it, and whatever may be the meaning of the third clause it will not help Mr. Jelf's argument, for if his argument was already destroyed, as we think it was, by the plain meaning of the words of the first clause, it certainly was not brought to life again by anything in the third clause, and therefore it becomes unnecessary to decide what is the meaning of such third clause.

Appeal dismissed.

Solicitors for appellants: *Sole, Turner & Knight, for Cooper & Haselwood, Bridgnorth.*

Solicitors for respondents: *C. R. & H. Cuff, for G. Burd, Ironbridge.*

W. P.

[IN THE COURT OF APPEAL.]

1883
April 28.

SANDERS BROTHERS *v.* MACLEAN & Co.

Sale of Goods—Payment in exchange for Bills of Lading—Bill of Lading drawn in Sets of Three—Tender of Two only—Time when Tender to be made—Right of Vendee to reject.

Where by the terms of the contract of sale of goods to be shipped payment is to be made in exchange for bills of lading of each shipment the purchaser is bound to pay when a duly indorsed bill of lading, effectual to pass the property in the goods, is tendered to him, although the bill of lading be drawn in triplicate, and all the three are not then tendered or accounted for; and, if he refuses to accept and pay, he does so at his own risk as to whether it may turn out to be the fact or not that the bill of lading tendered was an effectual one, or whether there was another of the set which had been so dealt with as to defeat the title of the purchaser as indorsee of the one tendered.

Per BRETT, M.R., the seller of such goods should make every reasonable exertion to forward the bills of lading to the purchaser as soon as possible after the shipment, but there is no implied condition in such a contract that the bills of lading shall be delivered to the purchaser in time for him to send them forward so as to be at the port of delivery, either before the arrival of the vessel with the goods or before charges are incurred there in respect of them.

ACTION for breach of contract in not accepting a certain quantity of old iron rails sold by the plaintiffs to the defendants. The contract was contained in bought and sold notes sent by the brokers to the parties, in each of which the terms were essentially the same. The bought note which was addressed to the defendants, Messrs. Maclean, Maris & Co., was dated London, the 7th of May, 1880, and was as follows:—

"Gentlemen,—We have this day bought for your account, by your authority, from Messrs. Sanders Brothers, of 25, Abchurch Lane, 2000 (say two thousand) tons of old iron flange rails at the price of 82*s.* (say eighty-two shillings) per ton, including cost, freight, and insurance to Philadelphia, U.S.

"Shipment to be made during the months of July $\frac{\text{and}}{\text{or}}$ August next.

"Payment to be made in net cash in London in exchange for bills of lading and policies of insurance of each cargo or shipment. A sworn weigher's certificate to be given for each cargo

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with the shipping documents or sellers to be answerable for United States Customs weights."

In pursuance of the contract the plaintiffs on the 17th of July, 1880, caused 1136 tons of old iron rails to be shipped on the steamship *Coronilla*, at Sebastopol, for Philadelphia, U.S. The master of the ship signed and delivered a set of three bills of lading in respect of such shipment to one Mr. Mollivo, who was the shipper of the rails and the person from whom the plaintiffs had procured them. Mollivo duly forwarded two of the bills of lading from St. Petersburgh to the plaintiffs in London, and retained the third in his own hands, but he made no use of it or in any way dealt with it. On the 3rd of August, 1880, the plaintiffs tendered the two bills of lading they had so received, duly indorsed, to the defendants in London, but the defendants refused to pay for and accept the iron rails, on the ground that it appeared from the bills of lading that they were drawn in a set of three and that therefore they had a right to refuse unless all three were offered to them. The plaintiff thereupon both telegraphed and wrote on the same day to Mollivo at St. Petersburgh for the third part of the bill of lading, and having got it, they tendered all the three parts to the defendants on the 9th of August, 1880. The defendants refused again to pay for and accept the iron rails, the steamer having passed Gibraltar on the 29th of July, and being therefore so far on her voyage that she would arrive at Philadelphia before the bills of lading could be sent there by the defendants, so that warehouse and other expenses would necessarily be incurred by reason of there not being a consignee to receive the rails on their arrival.

The cause was tried before Pollock, B., at the London sittings in December, 1881, when that learned judge put these questions to the jury: 1st. Has a custom been proved that in the case of a contract such as was made between the plaintiffs and defendants the vendee is bound to accept bills for his goods when only two bills of lading are tendered? 2nd. Has a custom been proved that in the case of a contract such as was made between the plaintiffs and defendants the vendee is bound to accept bills against shipping documents although they are tendered at a date when the cargo having gone forward to America by steamer will

arrive before the bills of lading can arrive? The jury answered the first of these questions as follows: "The custom has not been proved by the evidence, but it is the unanimous opinion of the jury that it is the usual practice of the city of London to do so." And they gave the following answer to the second question: "The custom has not been proved by the evidence, but it is the unanimous opinion of the jury that where due diligence has been employed, and in this instance they believe that the plaintiffs did exercise such diligence, the vendee is bound to accept such bills of lading."

The learned judge afterwards, and after argument on further consideration, directed the verdict and judgment to be entered for the defendants.

The plaintiffs appealed.

Sir F. Herschell, S.G., and *Shiress Will*, for the plaintiffs. If the first tender which was made on the 3rd of August was a good one, the point raised by the defendants with regard to the second tender will not arise, and the plaintiffs would be entitled to succeed, as the defendants had then failed to pay in cash against bills of lading according to their contract. Now the first tender was good. The defendants contend that it was not, since after the case of *Glyn, Mills & Co.* v. *East and West India Dock Co.* (1) they say that where a bill of lading has been drawn in triplicate, the whole three must be tendered, or any absent one duly accounted for and shewn not to have been dealt with. But that case has not altered the law as decided in *Barber* v. *Meyerstein* (2) that as soon as any one of a set of bills of lading has been delivered duly indorsed to a person, it passes the ownership in the goods, which are at sea and which it represents, to such person. It becomes then the bill of lading, and therefore apart from the finding of the jury in the present case with reference to any custom, the tender on the 3rd of August was that of an effectual bill of lading for passing the property in the goods to the defendants, and was a fulfilment of the plaintiffs' part of the contract of sale which entitled them to payment. Next, if that tender was not good, then the tender of the 9th of August, when all the

(1) 7 App. Cas. 591. (2) Law Rep. 4 H. L. 317.

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three parts were offered to the defendants, was a good tender. The only objection raised to it on the part of the defendants is that it was too late, because the steamer with the iron would then have reached her port of destination before the bills of lading could arrive there, and that charges and expenses which would fall on the purchaser would be incurred in consequence of such delay. There is no express or implied warranty in the contract of sale that the bills of lading shall be handed to the defendants in time to enable them to be forwarded to America before the arrival there of the goods.

[BRETT, M.R. Can you delay for any time the tender of the bills of lading? If no specific time is mentioned in the contract it must surely be made within a reasonable time.]

That would be for a jury to determine. Even if there be any implied stipulations that the bill of lading should be offered in time to be sent to America, before charges have been incurred there in respect of the goods, still it is only a collateral stipulation the breach of which does not entitle the defendants to refuse the goods, but only to be compensated by damages, for it comes within the principle referred to by Lord Ellenborough in *Davidson* v. *Gwynne* (1), "That unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant for the breach of which the party injured may be compensated in damages."

Webster, Q.C., and *Moulton*, for the defendants. The learned judge at the trial was of opinion that neither of the tenders was a good one. The defendants were entitled to have the iron rails delivered to them from the ship free of all expenses, that is the meaning of this contract; therefore the tender should have been made in such time that the defendants, the purchasers, could have got their goods free of charges. Benjamin on Sale, 3rd Ed. p. 688, where after stating that "the indorsement and transfer to the buyer of bills of lading, dock and wharf warrants, delivery orders, and other like instruments, which among merchants are known as representing the goods, would form a good delivery in performance of the contract," it is stated, "the transfer of such documents

(1) 12 East, 381, at p. 389.

would of course not be a sufficient delivery by the vendor, if the goods represented by the documents were subject to liens and charges in favour of the bailees." There is no distinction between a contract to pay on delivery of goods, and to pay on delivery of bills of lading which represent the goods, and as therefore there is no liability to pay on delivery of goods where such goods are liable to liens and charges, so there is no liability to pay on delivery of bills of lading where such bills are subject to any lien. On the tender of the 3rd of August on the face of the bill of lading, it appeared to have been drawn in triplicate, and therefore unless the third was satisfactorily accounted for, a purchaser was not bound to accept only two of them.

[BRETT, M.R. Suppose it had been shewn that the third had been kept by the captain and was with the ship?]

That might have been a sufficient answer, but here it appeared that all three had gone to St. Petersburgh, and that one of them was retained there by Mr. Mollivo the shipper of the goods. In *Kearney* v. *West Granada Mining Co.* (1) where the plaintiffs had contracted to deliver to the defendants certain bills which were foreign bills drawn on the defendants in sets of three, the Court of Exchequer held that the plaintiff did not perform his contract by delivering to the defendants one part of each of the bills so drawn. In *Glyn, Mills & Co.* v. *East and West India Dock Co.* (2) Lord Cairns in the course of his judgment says, "But the confusion, the difficulty and embarrassment, have arisen from there not being what I have supposed one title-deed, but there being more than one, in this case three parts of the title-deed, that is to say, of the bill of lading;" then after stating that the shipowner ought to be protected, and giving reasons for the judgment the House of Lords delivered in that case, his Lordship (at p. 600) says: "The mercantile world may, if they think right, alter the practice of giving bills of lading in more parts than one. That would be one course which might be taken. But even supposing that the bill of lading is in more parts than one, all that any person who advances money upon a bill of lading will have to do if he sees, as he will see on the face of the bill of lading, that it has been signed in more parts than one, will be to require that all

(1) 1 H. & N. 412. (2) 7 App. Cas. 591, at p. 599.

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the parts are brought in, that is to say, that all the title-deeds are brought in. I know that that is the practice with regard to other title-deeds, and it strikes me with some surprise that any one would advance money upon a bill of lading without taking that course of requiring the delivery up of all the parts." The contract here states that the payment is to be made "in exchange for bills of lading of each shipment." That means the complete set of the bills of lading which were given for each shipment. Therefore the tender on the 3rd of August was not a good tender. As to the tender on the 9th of August the goods would then have become subject to charges not contemplated by the contract before the purchaser could have a delivery of them. If the whole set of the bills of lading could have been tendered on the 3rd of August (as they might have been if one had not been retained at St. Petersburgh), then the tender on the 9th of August was not made within a reasonable time after the shipment, and on that ground the second tender was bad. The purchase-money was, by the terms of the contract, to cover freight and insurance, so that the purchaser on payment of the purchase-money was to be entitled to the goods ex ship without being liable to further charges, and as the vessel in this case must have arrived at Philadelphia before the bills of lading which were tendered on the 9th of August could have arrived there, charges would necessarily be incurred in consequence of there being no one entitled to receive the goods on their arrival. That would make the tender on the 9th of August bad, as the defendants had a right to have such bills of lading offered to them in sufficient time to enable them to forward them to Philadelphia before the arrival there of the goods, or at all events before charges would be incurred in respect of them.

Sir F. Herschell, S.G., replied.

Cur. adv. vult.

BRETT, M.R. In this case the action was brought for the non-acceptance of a certain cargo of railway iron. The contract was a contract for forward deliveries for shipments to be made within certain months. The payment was to be against bills of lading in London. The shipment was made in the Black Sea for Philadelphia,

and the vessel sailed, but before she arrived at Philadelphia the defendants declared that they would not accept the cargo, and the question is whether they were justified in that refusal. On the 3rd of August the plaintiffs offered in London two copies of the bill of lading of this cargo, duly indorsed to the defendants, but the defendants refused to accept those bills of lading, and to pay against them, on the ground that only two copies of the bill of lading were then offered to them, and that inasmuch as the bill of lading had been drawn in a set of three copies, they were entitled to reject them and the cargo, and to refuse payment unless all the three copies of the bill of lading were offered to them. The facts with regard to these bills of lading were that besides the two copies which were offered to the defendants in London, there was a third in the hands of the original shipper of the iron at St. Petersburgh. Upon this refusal of the defendants to pay as against the two copies of the bill of lading in London, the plaintiffs wrote to St. Petersburgh and finally obtained the third, and on the 9th of August they offered all the three bills of lading, but they were refused. By the 9th of August the ship had got so far on its voyage that it would arrive at Philadelphia before the bills of lading could be so forwarded as to reach the defendants' agents there, and therefore, there being no one to receive the cargo, the captain would have a right to land and warehouse it at the expense of the consignor or consignee, and if his ship was detained by reason of no one being present to receive the cargo, he would be entitled to demurrage if the charterparty or bill of lading was so drawn. Whether these were the real and true grounds of the refusal of the cargo it is not necessary to determine, as, if they are good and legal grounds for the refusal, the defendants have a right to rely upon them. The learned judge, Pollock, B., who tried the cause, left to the jury the question whether, after the objection had been taken to the bills of lading on the 3rd of August, the plaintiffs made all reasonable efforts in order to obtain all the copies of the bill of lading in time. The jury found that they did. Nevertheless, and notwithstanding that finding, Pollock, B., directed the verdict and the judgment to be entered for the defendants, on the ground that it was a good objection under such a contract as this to decline to accept the bills of lading and the

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cargo unless all the existing copies of the bill of lading were offered, and he held that the offer on the 9th of August had not cured the defect of the offer on the 3rd. Now I cannot agree in opinion with that learned judge as to either of those tenders of the bills of lading, and, in my opinion, both tenders were good. With regard to the first the question is whether, where by the terms of an ordinary contract of sale relating to goods shipped payment is to be made against bills of lading, it is a part of that contract that all the existing copies of the bill of lading must be offered in order to entitle the sender of the goods to payment? If only one copy of a bill of lading has been indorsed, it is plain and known law that the delivery of that copy so indorsed, with an intention to pass the property in the goods, passes the property, and will entitle the person to whom it is delivered to demand possession of the goods on their arrival; and it is also known law that if it be so indorsed the person to whom it is so delivered can, by indorsement for value, pass the property to somebody else, and, if that one copy of the bill of lading is the first which is indorsed, it passes the property so that no subsequent indorsement of any other of the copies will have any effect upon the property in the goods. It was, however, urged before Pollock, B., not that that view of the law had been altered, but that a difficulty had arisen in the mercantile world which made it unsafe for a vendee, under these circumstances, to accept the first indorsed copy of the bill of lading, because, if the original shipper remained in possession of any other copy of the bill of lading he might fraudulently indorse it, and present that subsequently indorsed copy of the bill of lading to the captain of the ship before any of the other copies had been presented to him, and then the shipowner would be absolved, as against the real owner of the goods, for having delivered the goods under such bill of lading, although such indorsement was fraudulent. That was so decided by the House of Lords in the case of *Glyn, Mills, & Co.* v. *East and West India Dock Co.* (1) I make no observation upon that decision, except that it is to be loyally followed. It was inevitable, to my mind, upon that decision by the House of Lords, that somebody who wanted to reject a cargo would avail himself of it as a ground for his doing so.

(1) 7 App. Cas. 591.

That has now happened, and the question is whether there is anything in that decision which alters the old law.

Now the House of Lords, as I understand that case of *Glyn, Mills, & Co.* v. *East and West India Dock Co.* (1), distinctly stated that the old law with regard to the passing of property by bills of lading was not altered, and that the first copy of the bill of lading, properly indorsed for value, with an intent to pass the property, passed the property, and that no other copy of the bill of lading subsequently indorsed would have any effect in passing the property at all. They held only that although the true owner of the goods could sue the person into whose possession the goods had gone, because the goods were his, yet that he could not sue the captain or the shipowners because when he took the property in the goods by virtue of the indorsement of the first copy of the bill of lading, he took it subject to this contingency, that if the goods were delivered by the captain to anybody else upon a subsequent copy of the bill of lading fraudulently indorsed by the consignor, he could not sue the shipowner, but he could sue anybody else who dealt with the goods which were his property. If that be true, could it be the meaning of this contract, which states in terms that payment is to be made against bills of lading (and which here is the same as if it had been payable on presentation of bill of lading, because bills of lading here apply to shipments in different months), that although the bill of lading offered would pass the property and give the right of possession, yet nevertheless the vendee had a right to reject the cargo, because all the three copies or parts of the bills of lading were not delivered to him? In my opinion such is not the result of the case of *Glyn, Mills, & Co.* v. *East and West India Dock Co.* (1), and it would be contrary to the practice and to the known principles of mercantile law with regard to bills of lading. Therefore I cannot agree with the learned judge, Pollock, B., in the decision he came to. That of itself would be sufficient to decide this case. But considering that the other point was argued, and that it is a matter of mercantile law which, in my opinion, ought not to be left in any doubt, I desire to say for myself that I think the second tender

(1) 7 App. Cas. 591.

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on the 9th of August was a good tender, even assuming that the first was bad.

The objection taken to this last tender was this. It was said that it was made at such a time that the bills of lading could not have been forwarded to Philadelphia in time to be there on the ship's arrival, and that it was an implied condition in the contract of sale of the goods that the bills of lading should be delivered to the consignee or vendee in time for him to send them forward, so that they should be at the port of delivery when the ship arrived, and that if that condition was not fulfilled the consignee or vendee had a right to reject the goods. It was stated further, that if we should not go that length at least we must hold there is implied this, that the bills of lading be delivered to the consignee in such a time as that he could forward them to the port of delivery before charges are incurred, and that that also is not merely an implied stipulation but is an implied condition in the contract, and if not fulfilled the consignee has a right to reject the cargo. The first objection to that contention seems to me to be that the Court has no right to import anything into a contract which it would not be clear to every reasonable man must have been present to the minds of both contracting parties, and agreed to by both. Take the first of these cases. The bill of lading, it is said, must be delivered in time to arrive at the place of destination at or before the time the ship arrives. A cargo is worth 20,000*l.*: if the bill of lading could only arrive the day after the ship it would be monstrous to say that the vendee should have a right to reject the whole cargo although no damage had been done to anybody. So, if the bill of lading is to be delivered so that it may arrive in ordinary course before charges are incurred, a cargo worth 20,000*l.* may be shipped to a place where it would be for the benefit of the vendee that it should be, but where it would be ruin to the vendor to have it if he was obliged to sell it there again, and yet because charges of 10*l.* may have been incurred can it be said that the vendee has a right to reject the cargo? Again, supposing even that there had been an express stipulation in the contract that the bill of lading should be delivered at such a time as that it might arrive at the port of delivery before charges were incurred, or at the time the ship arrived, yet

as the rule is not to construe a stipulation in a contract to be a condition unless it is expressly stated that it is a condition, or unless the breach of it goes to the whole value of the contract, such a stipulation could never have been a condition, because obviously a breach of it would not go to the whole value of the contract. As, therefore, if it were an express stipulation, it would not amount to a condition, obviously no such condition can be implied. It is equally impossible, to my mind, to say that even a stipulation ought to be implied in the contract that the bill of lading should be delivered so that it may arrive before or at the time of the arrival of the ship or before charges are incurred.

But, on the other hand, merchants never could have contemplated that after a cargo had been destined to a purchaser or consignee the shipper should keep the bill of lading as long as he pleased. Therefore some stipulation with regard to this must be implied. The stipulations which are inferred in mercantile contracts are always that the party will do what is mercantilely reasonable. What, then, is the contract duty which is to be imposed by implication on the seller of goods at sea with regard to the bill of lading? I quite agree that he has no right to keep the bill of lading in his pocket, and when it is said that he should do what is reasonable it is obvious the reasonable thing is that he should make every reasonable exertion to send forward the bill of lading as soon as possible after he has destined the cargo to the particular vendee or consignee. If that be so, the question of whether he has used such reasonable exertion will depend upon the particular circumstances of each case. If there is a perishable cargo or one upon which heavy charges must surely be incurred, the reasonable thing for him to do is to make even a greater exertion than he would in the case of another cargo. That is one of the circumstances which has to be considered. Another circumstance would be from whence is the shipment? How near is the consignor to the ship so as to enable him to get possession of the bill of lading? If in the present case the bill of lading had been in London I should have thought that the consignors would be bound to deliver it much sooner than where as here they had to get it from St. Petersburgh. They were bound to use all reasonable exertion to get the

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bill of lading from St. Petersburgh and to offer it in London as soon as under the circumstances it was reasonable for them to do so. Whether they did use such reasonable exertion, and whether what they did was under the circumstances done within a reasonable time, was a question for the jury, and in this case it seems to me that substantially the jury found that they had done all that was reasonable, and therefore even if the first tender had been bad I should have thought that the second tender was good. I have thus given my opinion upon the construction of such a mercantile contract as this with regard to the two points that were raised, and in either view of the case it seems to me that the judgment of Pollock, B., must be reversed.

COTTON, L.J. This is an action by the vendors on a contract entered into between them and the defendants for the sale and purchase of cargoes of iron. It may be taken generally that the cargo was to be paid for in London in cash in exchange for bills of lading, and that two parts of the bill of lading of this particular cargo were tendered to the defendants on the 3rd of August, but they rejected those on the ground that it appeared by the parts of the bill of lading which were presented to them that the bill of lading had been drawn in three parts, and two only were tendered to them. Now what we have to consider is whether, under the contract, the plaintiffs did perform that which they were bound to do to entitle themselves to payment for the cargo. The words of the contract are these, "Payment to be made in London in cash in exchange for bills of lading and policies of insurance." There is nothing more.

Now what were the facts? As a matter of fact the third part of the bill of lading was still in the hands of a person in Russia to whom this cargo had originally belonged, and from whom it had been ordered by the plaintiffs, and, as this third part had not been in any way dealt with, the two parts of the bill of lading which were tendered were effectual to pass the property in this cargo to the defendants, and to enable them to receive the cargo. It was said, that the third part being still outstanding, the defendants were not secure, and undoubtedly the effect of the third part of the bill of lading not being delivered

to them would enable the person in whose hands it was, if he was so minded, to commit a fraud and to receive the cargo, if he first demanded it from the captain; and consequently after the captain had parted with the cargo the defendants would be prevented from requiring him to hand it over to them, because the presentation of the third part of the bill of lading to the captain would have justified him in handing over the cargo to the person who so presented it. Therefore undoubtedly it did expose the defendants to some risk, but the question is whether what was done by the tender of the 3rd of August did comply with the terms of the contract. There is no stipulation in this contract except that the payment shall be made in exchange for bills of lading, which I understand to be that, when a tender is made to the purchaser of a duly indorsed bill of lading which will effectually pass the property in the goods, then payment is to be made in cash by the purchaser to the vendor. If the parties had desired to insure the purchaser against any risk they should have put in some stipulation to that effect, but they have not done so. Now although undoubtedly if the third part of a bill of lading should be indorsed and parted with to some party before the tender of the first part, such tender would not be a compliance with the contract, because that which would be tendered would not be an effectual bill of lading, yet, in my opinion, if the purchaser chooses to refuse to accept the cargo, because he does not know whether in fact the tender does comply with the terms of the contract, and whether the other part of the bill of lading has been parted with or not, he does so at his peril, and if it should turn out on investigation that in fact what was tendered to him was an effectual bill of lading effectual to pass the property in the cargo then he broke his contract by not paying the money and by refusing to accept the cargo when such effectual bill of lading was tendered to him. Therefore, in my opinion, the tender on the 3rd of August was one which ought to have been accepted by the defendants, and that decides this case, there being no question at all as to the tender on the 3rd of August having been made within ample and sufficient time. I think it better not to give any opinion on the other point arising out of the tender on the 9th of August, which, having regard to my opinion as to the

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contract and what was done on the 3rd of August, really does not arise. I should only say that I in no way look favourably on the suggestion that there is an implied condition in this or any other similar contract that the bills of lading should be tendered so as to be capable of being sent out before the arrival of the ship at the port to which the cargo has to be sent.

BOWEN, L.J. On the 3rd of August the plaintiffs tendered to the defendants two of the set of bills of lading which the plaintiffs had received from St. Petersburgh from the shipper of the goods. The third of the set had been retained in St. Petersburgh by the shipper, and it is an admitted fact in the case that it never was in any way dealt with or attempted to be dealt with.

The defendants refused to accept the tender so made on the 3rd of August, and the first question is whether they were entitled to refuse it as not in accordance with contract. It was contended before us that under the present contract a tender of bill of lading was imperfect unless it included not merely those bills of lading which had been effectually dealt with and were sufficient to pass the property, but also a third bill of lading which was not in England, and which had still remained in the Russian shippers' hands. This is a question of construction of the contract although the contract is in common form, and our decision therefore may possibly affect other cases than that immediately before us.

The cargo had been shipped upon the 17th of July at Sebastopol. The captain of the vessel had retained one copy of the bill of lading for himself: and had delivered a set in triplicate to the shipper. The set of three had been sent to St. Petersburgh for the purpose of obtaining a consular certificate. The shipper had thence forwarded two out of the set of three to the plaintiffs, his correspondents and vendees, keeping one of the set in his own hands, of which, however, no sort of use was ever made. The point for our decision is whether in tendering the two bills of lading received by them, without the third so retained in St. Petersburgh, the plaintiffs were entitled to payment of the price of the goods under the contract.

I am of opinion that the first tender of the 3rd of August was perfectly good.

The law as to the indorsement of bills of lading is as clear as in my opinion the practice of all European merchants is thoroughly understood. A cargo at sea while in the hands of the carrier is necessarily incapable of physical delivery. During this period of transit and voyage, the bill of lading by the law merchant is universally recognised as its symbol, and the indorsement and delivery of the bill of lading operates as a symbolical delivery of the cargo. Property in the goods passes by such indorsement and delivery of the bill of lading, whenever it is the intention of the parties that the property should pass, just as under similar circumstances the property would pass by an actual delivery of the goods. And for the purpose of passing such property in the goods and completing the title of the indorsee to full possession thereof, the bill of lading, until complete delivery of the cargo has been made on shore to some one rightfully claiming under it, remains in force as a symbol, and carries with it not only the full ownership of the goods, but also all rights created by the contract of carriage between the shipper and the shipowner. It is a key which in the hands of a rightful owner is intended to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be.

The above effect and power belong to any one of the set of original bills of lading which is first dealt with by the shipper. Except in furtherance of the title so created of the indorsee, the other originals of the set are, as against it, perfectly ineffectual and have no efficacy whatever, unless they are fraudulently used for the purposes of deceit. By inveterate practice among most of the commercial nations of Europe, bills of lading have long been drawn by the shipowner in sets of three or more. Sometimes one of the set is retained by the captain, the others being transferred by the captain to the shipper. Sometimes the whole of the set are handed, upon shipment, to the merchant, the captain retaining a copy only. This practice of drawing bills of lading in triplicate may be at the present day, and under the altered conditions of communication between one part of the world and another, less valuable than it was when originally introduced.

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But it certainly had its distinct uses in the early stages of European commerce, and it still survives. If it survives it is probably that the commercial world still finds it more convenient or less troublesome to preserve it than to change it.

And it is plain that the purpose and idea of drawing bills of lading in sets—whatever the present advantage or disadvantage of the plan—is that the whole set should not remain always in the same hands. The possibility of its separation is intentionally devised for the purpose not of fraud, but of protecting honest dealing. The separation may conceivably afford opportunities of fraud, if the holders chose to be dishonest, but on the whole the commercial world is satisfied to run the risk of this contingency for the sake of the compensating advantages and conveniencies which merchants rightly or wrongly have, till lately at all events, believed to be afforded by the system of triplicates or quadruplicates. The shipper or his vendees may prefer to retain one of the originals for their own protection against loss, or to transfer it to their correspondents. In such cases they are in the habit of treating the remainder of the set as the effective documents and as sufficient for all purposes of negotiating the goods comprised in the bill of lading. The question we have to decide is whether the tender to the vendee of the only effective originals of the set is a sufficient tender under their contract, notwithstanding the absence of a third original, which is outstanding in the hands of the shipper; but which it is admitted in the present case has been in no way dealt with by him, and which has always remained in his hands as an ineffective and innocent triplicate.

If we were to hold that such a tender is not adequate, we must, as it appears to me, deal a fatal blow at this established custom of merchants, according to which, time out of mind, bills of lading are drawn in sets, and one of the set is habitually dealt with as representing the cargo independently of the rest. If the set, for purposes of contracts like the present, must always be kept together, the whole object, be it wise or unwise, of drawing bills of lading in triplicate is frustrated. For if one of the set were lost, or had been forwarded by the shipper or any subsequent owner of the cargo to his correspondent by way of precaution, the

cargo becomes unsaleable. The only possible object of requiring the presentation of the third original must be to prevent the chance, more or less remote, of fraud on the part of the shipper or some previous owner of the goods. But the practice of merchants, it is never superfluous to remark, is not based on the supposition of possible frauds. The object of mercantile usages is to prevent the risk of insolvency, not of fraud; and any one who attempts to follow and understand the law merchant will soon find himself lost if he begins by assuming that merchants conduct their business on the basis of attempting to insure themselves against fraudulent dealing. The contrary is the case. Credit, not distrust, is the basis of commercial dealings; mercantile genius consists principally in knowing whom to trust and with whom to deal, and commercial intercourse and communication is no more based on the supposition of fraud than it is on the supposition of forgery.

It appears to me, accordingly, that a tender is at all events in compliance with the present contract, by which all the effective bills of lading in existence are tendered. If, indeed, the absent original had been misused so as to defeat the title of the indorsees of the tendered residue of the set, the tender would have been bad. But the vendee was not entitled to reject the tender of the only effective documents on the bare chance that a third effective bill of lading might possibly have been dealt with when in fact it had not. The person who rejects effective and adequate documents of title on the ground that another document may possibly be outstanding, does so at his own risk. If his surmise turns out to be well founded, his rejection of the tender would be justified. But if it is a mere surmise and has no foundation in fact, he has chosen, by excess of caution, to place himself in the wrong. The bill of lading, I have said, may be regarded as a key of the warehouse where the goods are. Can a person who has contracted to pay on delivery of the keys of the warehouse, refuse to accept the keys tendered to him on the ground that there is still a third key in the hands of the vendor which, if fraudulently used, might defeat the vendee's power of taking possession? I think business could not be and is not carried on upon any such principle.

The argument has been pressed upon us that in the absence of

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the St. Petersburgh original there might be a difficulty in negotiating the two bills of lading out of the set of three. People who lend money upon or who purchase bills of lading can make their own terms. Whether they will trust to the current bills of lading produced in any case is a matter for themselves, and one upon which they probably would be guided by their faith in or distrust of their customer. But I do not believe that such suspicion, when it exists, is the natural or necessary consequence of the presentation of the two bills of lading without the third. We have had also pressed upon us in argument the decision in the House of Lords in the case of *Glyn Mills & Co.* v. *East & West India Dock Co.* (1) But that decision did not profess to alter the established usage of European merchants. It only shewed that it was attended, in the case of fraud, with a risk which had not been hitherto sufficiently understood. If the mercantile world, having its attention called to this risk, chooses to alter its mode of doing business, that is a matter for its own decision. It may not think the disadvantage of the risk, even when explained, sufficient to justify a departure from the known and recognised modes of transacting commercial business. But until and unless it alters its method of dealing, and the forms of the well-known contracts by which it is done, I can only interpret its usages and its contracts as I find them, and as I am satisfied they are understood by the commercial world. I entertain no doubt that in the present instance the tender of the only effective bills of lading in existence was a sufficient tender, and that it would be so considered by any jury of merchants.

As, in my judgment, the tender of the 3rd of August was sufficient, it becomes unnecessary to discuss the validity of the later tender of the 9th of August. I in no way dissent from what the Master of the Rolls has said, but I do not think it necessary to decide or to express a final opinion about it.

Judgment reversed.

Solicitor for plaintiffs: *Clements.*

Solicitors for defendants: *Maples, Teesdale, & Co.*

(1) 7 App. Cas. 591.

W. P.

[IN THE COURT OF APPEAL.]

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April 6.

CAPELL *v.* THE GREAT WESTERN RAILWAY COMPANY.

Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *ss.* 23, 34—*Settlement of Purchase-money by Arbitration—Costs of Arbitration—Payment due before Conveyance.*

Where the amount of compensation payable to the owner of land compulsorily taken under the Lands Clauses Act, 1845, is settled by arbitration, and the amount and the costs of the arbitration are awarded to the owner, such costs become payable to him within a reasonable time afterwards, and the execution of the conveyance by him of the lands taken is not a condition precedent to the payment of such costs.

APPEAL by the defendants from the judgment of Lopes, J., on further consideration, giving judgment for the plaintiff in an action to recover the costs of an arbitration under the provisions of the Lands Clauses Act, 1845. (1)

It appeared from the statement of claim, which is fully set out in the report in the Queen's Bench Division, that on the 24th of April, 1876, the Bristol and Exeter Railway Company, with whose Act of Parliament the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), was incorporated, gave the plaintiff notice to treat for the purchase of land of which he was the owner and in possession. By Act of Parliament the Bristol and Exeter Railway Company and the defendants, the Great Western Railway Company, were amalgamated as from the 1st of August, 1876. On the 19th of December, 1876, the amount of compensation payable by the defendants to the plaintiff was settled by arbitration under the Lands Clauses Act, 1845, and the sum of £1750 and the costs of the arbitration were awarded to the plaintiff. These costs were taxed on the 5th of August, 1881, at 177*l.* 12*s.* 6*d.*, and for this sum the action was brought on the 26th of October, 1881, but although the defendants had accepted the plaintiff's title in the land so taken, the necessary conveyances were not executed until the 23rd of December, 1881, which was after action brought, and the question was whether these

(1) 9 Q. B. D. 459.

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taxed costs of the arbitration were payable before the conveyance of the land to the defendants.

Lopes, J., held that the costs became payable within a reasonable time after taxation, and that the plaintiff was entitled to recover them in this action.

The defendants appealed.

R. S. Wright, for the defendants. The costs of arbitration are ancillary to the purchase-money, and are not payable, therefore, until the purchase-money is payable, which was here upon the execution of the conveyance to the defendants, and not before. The 34th section of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), is the section on which the question in this case arises. (1) It was argued in the Court below that under that section the claimant would be entitled to his costs of the arbitration, even though it should turn out he had no title to the land; but that would be most unjust, and yet unless such can be maintained the costs cannot be payable until the title has been made out and the conveyance to the company executed.

In *Todd* v. *Metropolitan District Ry. Co.* (2), Brett, M.R., then Brett, J., said, "Costs are an accessory to a valid claim." It is true that the costs in this case have been taxed, but taxation is immaterial: *Sharpe* v. *Metropolitan District Ry. Co.* (3), and if the plaintiff's contention is right he might sue for his costs directly after the award of the arbitrators has been made, and yet if he had no title the company would be unable to recover them back. The case of *Sharpe* v. *Metropolitan District Ry. Co.* (3) assists the defendants in shewing that the costs are not payable immediately without reference to title, because the arbitrator there awarded only in favour of part of the plaintiff's claim, and the costs were only in respect of that part in which the plaintiff succeeded. If,

(1) Sect. 34 of 8 Vict. c. 18 enacts: "All the costs of any such arbitration and incident thereto, to be settled by the arbitrators, shall be borne by the promoters of the undertaking unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions."

(2) 24 L. T. 435.

(3) 4 Q. B. D. 645; 5 App. Cas. 425.

then, the costs are not payable, at once, they cannot be payable before the conveyance has been executed, for there is no other time at which they would be payable. The case of *Guardians of the East London Union* v. *Metropolitan Ry. Co* (1) is a decision that the sum ascertained by the award as the price to be paid for the land taken by the company under the Lands Clauses Consolidation Act, 1845, cannot be recovered before the conveyance of the land has been executed, and surely therefore the costs, which are only ancillary to that, cannot be recovered at an earlier period. After service of the notice by the railway company of their intention to take certain land has been given as required by s. 18, the party served is bound to state the nature of his interest. If he state falsely the particulars of his claim, or makes an unfounded claim, the costs of the arbitration which have been so thrown away should be borne by him.

[BRETT, M.R. You want to read in s. 34 the words "if the claimant makes a good title to the lands," or words to that effect.]

It may be necessary to do so in order to do justice; an arbitrator has no jurisdiction to inquire into title.

[BOWEN, L.J. If the sum awarded is less than that offered by the company, then if the landowner had a good title to the land he is by s. 34 to bear half the costs of the arbitrator, but what is to be the consequence if he had no title to the land?]

He would get no costs at all.

A. Charles, Q.C., and *Bucknill*, appeared for the plaintiff, but were not called on.

BRETT, M.R. This is an action for the costs of an arbitration held under the Lands Clauses Consolidation Act, 1845, for settling the compensation to be paid to the plaintiff to whom notice to treat had been given by the defendants, the railway company, for the purchase of the plaintiff's interest in certain land taken by the company under the powers of their Act. The question is whether at the time this action was brought, such costs were so payable as to enable the plaintiff to maintaint his action, and I agree that that raises the question whether the

(1) Law Rep. 4 Ex. 309.

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plaintiff is entitled to have and keep such costs whether he has a title or not to the land so taken by the company. This depends on ss. 23 and 34 of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18). Sect. 23 enacts that if the compensation claimed shall exceed £50, and the party claiming compensation shall desire to have it settled by arbitration, the same is to be so settled. That right to go to arbitration arises from the fact that the company gave the plaintiff notice to treat for the purchase of the land they required, and that they proposed to exercise their powers under their Act against him, and to force him to submit or to go to an inquiry as to the price to be paid for the land. Then s. 34 says in very explicit terms as regards that inquiry, that the company are to pay all the costs of such arbitration, unless the sum awarded shall not be more than was offered by the company. Unless then we modify or alter the plain terms of that section, the plaintiff is entitled to the costs of the arbitration and to bring an action for them, and if so he is entitled to keep them. It is said that if the party claiming compensation has no valid title to the land he ought not to have the costs of the arbitration, and that we should add words in s. 34 which should have that effect, because it is said justice requires it. I protest against the suggestion that where the words of an Act of Parliament are plain, the Court is to make any alteration in them because injustice may otherwise be done. It is for the legislature and not for the Court to set such matters right. But if necessary to say so, I say that in my opinion there is no injustice. The railway company claim a right to take certain land under the compulsory powers of their Act, and they accordingly give notice to the party interested in such land, and the Act then says that the price of such land must be settled before the title to it is made out, and if it cannot be settled by agreement it is to be settled by arbitration or by a jury. It is the railway company who interfere and force the person who may be in possession of this land to the expense of an inquiry as to the price to be paid for it without reference to, and independently of, any question as to title, and then they say it is unjust that they should pay the expense of that inquiry. I do not see any injustice in it.

I do not deal with the case of a person who claims com-

pensation under s. 68, and I give no opinion on that subject, neither do I say anything about the case in which a person fraudulently gets a price fixed for land as to which he knows he has no title. The present is not any such case, but it is one where it is possible the plaintiff may not sufficiently know all about his own title, and the legislature has said that in such a case the costs of the inquiry with regard to the price to be paid for the land are to be borne by the railway company. Therefore the railway company must pay the costs of the arbitration at all events, and the plaintiff when he gets such costs is entitled to keep them whether his title to the land turn out to be good or not. Then I think he is entitled to such costs within a reasonable time after the award has been made, and I should say that the smallest possible time must be a reasonable time. This appeal must therefore be dismissed.

COTTON, L.J. I am of the same opinion. This is not the case of a person claiming compensation who has no title to the land, and the only question is whether the plaintiff has brought his action too soon. Therefore I will not say whether this action can or not be brought in a case which is outside our present decision, in which the claim is fraudulent, and made by one who knows he has no title or right to the land. Here is a case in which a person honestly makes a claim for compensation with regard to land of his taken by the railway company, the amount of which compensation has to be settled by arbitration. Then in that case the 34th section of the Act says that unless the sum awarded be the same or less than the sum offered by the company, the costs of such arbitration shall be borne by the company. It is said that such liability to pay costs ought to be, provided a good title to the land be made out by the person claiming compensation, but there is no such provision in the statute and nothing to modify the words of s. 34; and it is no more than just that the company who take the land against the will of the owner, and go to arbitration to fix the price, should pay the costs of such arbitration. Therefore the plaintiff is entitled to be paid his costs of the arbitration, and that within a reasonable time after the arbitration has been completed.

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As regards the case of *Todd* v. *Metropolitan District Ry. Co.* (1), that was a case under s. 68 of the Lands Clauses Consolidation Act, 1845, where it is not the railway company but the landowner who commences proceedings by serving the notice, and where the claim to compensation being for land said to be injuriously affected, the person who puts the machinery of the Act in motion may fail in establishing his claim, and so it may be quite right that he should not have the costs of the inquiry. Then in *Sharpe* v. *Metropolitan District Ry. Co.* (2) there were two claims, and the arbitrator awarded nothing in respect of one of those claims and the claimant therefore did not get her costs of the arbitration in respect of the claim as to which she failed. That is a very different case from the present one, in which an award has been made in favour of the plaintiff, and it is also different as it was under s. 68 and not under s. 34 of this Act.

BOWEN, L.J. I am of the same opinion.

Appeal dismissed.

Solicitors for plaintiff: *Mead & Daubeney.*
Solicitor for defendants: *Nelson.*

(1) 24 L. T. 435. (2) 4 Q. B. D. 645; 5 App. Cas. 425.

W. P.

[IN THE COURT OF APPEAL.]

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May 28.

COOPER AND ANOTHER *v.* PRICHARD.

Bankruptcy—Effect of Order of Discharge—Debt incurred by the Fraud or Breach of Trust of a Partner—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *sec.* 49.

The 49th section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), which enacts that "an order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust," is not confined to a fraud or breach of trust committed by the bankrupt personally.

Therefore, where a debt has been incurred by one of several partners for which the partnership is liable, and the partnership goes into liquidation under the Bankruptcy Act, 1869, a partner who has received his order of discharge is not thereby released from such debt if it was incurred by fraud, though he himself was innocent of such fraud.

APPEAL by the defendant from the judgment of Pollock, B., at the trial.

The defendant was a partner of a firm of solicitors carrying on business under the style of Chapman, Turner, & Prichard, but which firm in fact consisted only of Turner and the defendant. In 1879, the plaintiffs, who were two maiden ladies, employed the firm with reference to the sale of a house of theirs to the Metropolitan Board of Works, and Mr. Turner as a member of the firm, at the completion of the sale, on the 10th of October, 1879, received the purchase-money from the Board with the authority of the plaintiffs. This money Mr. Turner undertook to invest for the plaintiffs on mortgage, and he afterwards informed the plaintiffs that he had done so; but instead of investing he misappropriated it to his own use, and on the 15th of February, 1881, he absconded. The firm had carried on business at Lincoln's-Inn-Fields, and in the City, and the defendant, who attended only to the City branch, was ignorant and innocent of the fraud which had been so committed by his partner Turner.

On the 22nd of February, 1881, the firm filed a petition for liquidation in the London Bankruptcy Court, describing themselves as solicitors and scriveners, and in due course the creditors resolved that the affairs of the firm should be liquidated by

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arrangement, and they ultimately granted the defendant his discharge.

The present action was then brought to recover the money which had been so received and misappropriated by Turner, and for which the defendant was alleged to be liable as partner.

The defendant claimed to be released from all such liability by the effect of his discharge in the liquidation proceedings, but Pollock, B., notwithstanding such discharge, gave judgment for the plaintiffs for the amount claimed.

The defendant appealed.

Horace Davey, Q.C., and *Grantham, Q.C.* (*G. W. Lawrance* with them), for the defendant. The question depends on the construction of s. 49 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), on which the plaintiffs rely as excepting the effect of an order of discharge where the debt or liability has been incurred by any fraud or breach of trust. (1) Breach of trust in this case there was none; it was a breach of promise to invest.

[FRY, L.J. There was a debt for which the partnership was liable, incurred by fraud, and the 49th section excepts the discharge where there is a debt incurred by any fraud.]

The separate estate of an innocent partner is not liable in respect of a tort committed by another partner: *Ex parte Adamson* (2), where James, L.J., in delivering the judgment of himself and Baggallay, L.J., says: "In cases of fraud or breach of trust, which is only one form and instance of fraud, there never was any division of liability between the tort feasors; every person participating in the tort was liable to make good the whole; the liability of each in Equity was for the whole amount; and the proof in

(1) By s. 49 of 32 & 33 Vict. c. 71, "an order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust, nor from any debt or liability whereof he has obtained forbearance by any fraud, but it shall release the bankrupt from all other debts proveable under the bankruptcy, with the exception of (1) debts due to the Crown, (2) debts with which the bankrupt stands charged at the suit of the Crown, or of any person for any offence against a statute relating to any branch of the public revenue, or at the suit of the sheriff, or other public officer, on a bail bond entered into for the appearance of any person prosecuted for any such offence."

(2) 8 Ch. D. 807, at p. 820.

bankruptcy was exactly commensurate with the liability." The defendant having obtained an order of discharge is released by s. 49 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), unless the debt for which his estate is liable was incurred by fraud or breach of trust, and although in the *Emma Silver Mining Company* v. *Grant* (1), the late Master of the Rolls, held that that exemption in that section applied to a constructive trust, still the fraud or breach of trust which is to defeat the release given by the order of discharge, is intended by that section to mean the fraud or breach of trust committed by the bankrupt who has obtained the order of discharge. As stated by Jessel, M.R., in *Emma Silver Mining Company* v. *Grant* (1), the person who is not to be protected by the order of discharge under s. 49 of the Bankruptcy Act, 1869, is intended to be the same as the insolvent debtor who is made liable to the penal sections of the Debtors' Act, 1869 (32 & 33 Vict. c. 62), and the debt incurred by fraud for which the insolvent debtor is to remain liable by s. 15 of that Act, is there clearly shewn to be a debt which *he* incurred, or *he* obtained by any fraud. The Debtors' Act, 1869, moreover, subjects the fraudulent debtor to the punishment of imprisonment, (sects. 11 and 13), which shews that it is limited to the personal fraud of such debtor. The Bankruptcy Act, 1869, should be construed in like manner, the object of the two Acts being the same.

They also cited *Blair* v. *Bromley* (2); *Ex parte Heaton* (3); and *Larkin* v. *Marshall.* (4)

A. Wills, Q.C., and *D. Gardiner*, appeared for the plaintiffs, but were not called on.

BRETT, M.R. In this case Mr. Prichard was in partnership with a Mr. Turner, carrying on together the double business of a solicitor and scrivener. Now it is part of that business to receive money from clients for the purpose of investing it on securities if so directed. In this case Turner, acting for the firm and under the authority which he had as partner to bind the firm, received money for the purpose of its being invested on security, and having so received it he was bound as an agent of the partnership

(1) 17 Ch. D. 122.
(2) 5 Hare, 542; and on appeal, 2 Ph. 354.
(3) Buck. 386.
(4) 14 Jur. 46.

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to invest it accordingly, and if he had done so it would have been an investment by the firm, because in so investing it Turner would have been acting within the scope of his authority as partner. He did not however do so, but committed a fraud by misappropriating the money to his own use instead of investing it. He committed another fraud when he misrepresented what he had done, and told one of the plaintiffs that he had invested the money. He was authorized as a partner to make statements as to whether he had invested the money or not, therefore Mr. Prichard was liable before his bankruptcy for both these frauds, they having been committed by Turner in the course of doing that which he was authorized as partner to do.

The question then is whether having been made a bankrupt and having obtained his order of discharge, Mr. Prichard is not nevertheless just as much liable for these frauds as he was before his bankruptcy. That depends upon the construction of s. 49 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71). That section enacts that "an order of discharge shall not release the bankrupt from any debt or liability;" that must by necessary implication mean any debt or liability of his binding on him, the bankrupt; then follow the words "incurred by means of any fraud or breach of trust." Now, notwithstanding all that has been urged on behalf of Mr. Prichard, you cannot bring him within the protection and release given by his order of discharge unless you read the word "his" instead of the word "any" before the words "fraud or breach of trust" in that 49th section, or unless after those last words you add the words "committed by him." It is, however, a well-known rule that in construing an Act of Parliament one has no right to introduce words into the enactment, unless it is obvious that it cannot be made sensible without doing so. We have no right to speculate as to whether the legislature intended that a bankrupt should not be discharged where the debt or liability was incurred by any fraud or breach of trust other than his own, but if I were to speculate I should say that it was the foundation of the bankrupt laws that the bankruptcies to be allowed and protected were only bankruptcies which had been incurred honestly, and here the bankruptcy was actually brought about by the dishonesty of one of the partners.

The ground, however, of our judgment is that there is no reason which obliges us to alter the words of the statute, and that therefore the order of discharge does not release Mr. Prichard from liability for the fraud of his partner.

LINDLEY, L.J. I am of the same opinion. The first question is whether the firm consisting of Turner and Prichard was liable for this money. That the firm was liable cannot I think be doubted when the facts are known. Then was that liability of the firm incurred by means of any fraud or breach of trust? Looking at Turner's conduct it would be very difficult to say that such liability of the firm was not incurred both by fraud and some form of breach of trust. Now, that being so, we have to construe s. 49 of the Bankruptcy Act, 1869, and the whole difficulty arises upon that section. In substance that section releases the bankrupt from all debts provable under the bankruptcy but for certain exceptions there specified, and therefore we have to see whether this case falls within any of those exceptions, as, if it does not, Mr. Prichard, having got his order of discharge, would be released from this liability. One of these exceptions is where the debt or liability is "incurred by means of any fraud or breach of trust." Is that to be construed as applying only to the personal fraud or breach of trust of the bankrupt? The language of the enactment seems to me to be opposed to this exception having that limited application, for it is very general and is not restricted by such words as "his" fraud or "his" breach of trust, or any fraud or breach of trust "committed by him." When one looks further on one finds the following exceptions "debts due to the Crown; debts with which the bankrupt stands charged at the suit of the Crown or of any person for any offence against a statute relating to any branch of the public revenue."

Now, suppose one partner of a firm of distillers or tobacconists, without the knowledge of one of his copartners, were to be guilty of malpractices which infringed the Revenue Acts by which the firm became liable to the Crown, the innocent partner would certainly be unable to get protection under his discharge in bankruptcy from such liability. That seems to me to shew that we ought not to put the limited construction on this section

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which has been contended for on behalf of the appellant, and unless we can see our way clear (which I think we cannot) to cut down the general language of the enactment, we ought not to do so. I therefore think that the decision of Pollock, B., was right.

FRY, L.J. I entirely concur with the conclusion arrived at by the other members of this Court. I see no ground to limit the words of the enactment, which are very general. I think the debt in this case was one clearly incurred by means of fraud. Whether it was incurred by breach of trust it is not necessary to decide.

Appeal dismissed.

Solicitors for plaintiffs: *Hindson, Miller, & Vernon.*
Solicitors for defendant: *Smith, Fawdon, & Low.*

W. P.

Feb. 27

[IN THE COURT OF APPEAL.]

KENDAL *v.* MARSHALL STEVENS & Co., AND OTHERS.

Sale of Goods—Stoppage in transitu—Termination of Transit—Ulterior and Subsequent Transit—Goods stopped in Possession of Forwarding Agent of Vendee.

When goods have been sent by an unpaid vendor through a carrier to a forwarding agent, who has been appointed by the vendee, and who receives the necessary orders from the vendee and not from the vendor, the transit of the goods upon reaching the hands of the forwarding agent is at an end and the right to stop in transitu is lost, even although the goods may have been intended to be sent to an ulterior and subsequent destination.

L. bought certain goods of W. at Bolton, saying nothing as to the place of delivery. L. afterwards arranged with M. that the goods should be sent by steamer from Garston to Rouen. L. then instructed W. to send the goods to M. at Garston. W. accordingly despatched the goods by railway. The railway company gave notice to M. of the arrival of the goods, and further gave notice that they would hold the goods as warehousemen. L. then filed a petition for the liquidation of his affairs by arrangement; he had not paid W. for the goods. W. thereupon stopped the delivery of the goods, and M. returned them to him. The trustee in liquidation of L. having brought an action against M. and W. to recover the value of the goods:—

Held, that the transit of the goods had ceased when the goods reached Garston

and came into the possession of M., as forwarding agent for L., that the right to stop in transitu was then at an end, and that the trustee was entitled to recover the value of the goods.

THIS was an appeal by the plaintiff from a judgment of Mathew, J., in favour of the defendants.

The plaintiff was the trustee appointed under a petition presented by Louis Leoffler for the liquidation of his affairs by arrangement, pursuant to the Bankruptcy Act, 1869, s. 125. The defendants, Marshall Stevens & Co., carried on business at Liverpool and Garston, in Lancashire, as shipping agents and carriers, and the defendants, Peter Ward & Son, carried on business at Bolton, in the same county, as cotton-waste dealers. The facts of the case are sufficiently stated in the judgment of

MATHEW, J. This is an action tried before me without a jury, in which the plaintiff, as trustee of the property of Louis Leoffler in liquidation, sought to recover for an alleged conversion of the goods of Leoffler. The question in the cause was whether there had been a valid stoppage in transitu of the goods, while in the hands of the defendants Marshall Stevens & Co., by the defendants Peter Ward & Son, who were unpaid vendors. The facts, which were not disputed, appeared from the correspondence put in at the trial and the statements of counsel. The goods were fifty-five bales of cotton-waste, which had been purchased by Leoffler on the 9th of November, 1880, of the defendants Ward & Co., of Bolton, by verbal contract. At the time of the sale nothing was said as to the place of delivery. After the goods had been bought, Leoffler arranged with the defendants Marshall Stevens & Co., who were carriers and forwarding agents in business at Liverpool and Garston, that the goods should be sent to them from Bolton to be shipped as soon as possible by one of their regular line of steamers to Rouen at a through rate from Bolton to Rouen. On the 12th of November Ward & Co. sent to Leoffler the following telegram: "Where shall we send the combing? It is ready for delivery. Send us an order at once and oblige." To this Leoffler replied, "Mark bags D. 1 and upwards, and send to Marshall Stevens & Co., Garston. Put separate weights on invoice." On the 13th of November Ward & Co.

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delivered the goods at the London and North-Western station at Bolton, to be forwarded to Marshall Stevens & Co., Garston. On the 12th of November Leoffler advised Marshall Stevens & Co. that the goods had been sent to them, and directed that the goods should be forwarded to Rouen. On the 18th of November Leoffler stopped payment and filed a petition in liquidation. On the 15th of November the goods, which had not been paid for, reached Garston, and the railway company on the same day gave Marshall Stevens & Co. the usual notice that the goods had arrived, and that if delivery were not taken in due course, the company would hold them as warehousemen, and charge rent. The goods remained for some days in the goods' shed of the railway company waiting the sailing of Marshall Stevens & Co.'s steamer to Rouen. On the 22nd of November Ward & Co. having ascertained that the goods had not been shipped by Marshall Stevens & Co., gave them notice to stop delivery. The goods were afterwards sent back by Marshall Stevens & Co. to Ward & Co. under an indemnity, and this action was brought to try the question whether there had been a valid stoppage in transitu.

It was contended for the plaintiff that when the goods had reached the destination indicated by the buyer to the sellers, viz. Garston, and were then delivered into the sheds of the railway company, the transit was over. From that time, it was said, the railway company under their notice to Marshall Stevens & Co. held the goods as warehousemen for the buyer, who might give what directions he pleased as to their ultimate destination. The case of *Dixon* v. *Baldwen* (1) was relied upon as being directly in point. On the other hand, it was argued for the defendants that the goods when stopped were actually in course of transit from Bolton to Rouen; that the delay at Garston was solely for purposes of transmission; that Marshall Stevens & Co. had charge of the goods under a contract which made Rouen the place of delivery, and that the sender never intended to give any fresh orders as to their destination, and never intended Marshall Stevens & Co. to receive or hold the goods on his behalf.

I think the contention of the defendants is right. The true question seems to me to be whether the goods at the time when

(1) 15 East, 175.

the notice to stop was given by the sellers were as matter of fact in course of transmission to the destination intended by the buyer. The buyer is not bound to tell the seller, to what place or to whom he means to send the goods. But when the buyer stops payment, and the goods have not been received into the actual possession of the buyer, or some person empowered to receive the goods for him, and are still in the hands of agents for the purpose of carriage, the unpaid seller may follow the goods and prevent their delivery to the buyer. In this case the goods were never in the actual possession of the buyer, nor of any one empowered to take delivery on his behalf. The goods were in charge of Marshall Stevens & Co. under a contract of carriage, and they remained in the hands of the railway company, as agents of Marshall Stevens & Co., for the purpose of being sent on by Marshall Stevens & Co.'s steamer to their ultimate destination.

In *Dixon* v. *Baldwen* (1) the majority of the Court considered, as appears from the judgment of Lord Ellenborough, that at the time when the goods were stopped they were in the hands of agents of the buyer "waiting for new orders from the purchaser to put them again in motion, to communicate to them another substantive destination, and that without such orders they would continue stationary." But in this case, as I collect from the correspondence, Leoffler was pressing Marshall Stevens & Co. when the goods had arrived at Garston to ship them at once for Rouen, and to send him bills of lading.

There was clear evidence that the buyer never intended that Marshall Stevens & Co. should have charge of the goods for any other purpose than for the performance of their contract with him to send them from Bolton for delivery to Rouen, and that he never contemplated any other place of delivery. The rule of law which is applicable, as it seems to me, to the facts of this case, is thus stated in the judgment of James, L.J., in the case of *Ex parte Rosevear China Clay Co.* (2): "The authorities shew that the vendor has a right to stop in transitu until the goods have actually got home into the hands of the purchaser, or of some one who receives them in the character of his servant or agent. That is the cardinal principle. In order that the vendor should have lost

(1) 5 East, 175. (2) 11 Ch. D. 560.

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that right, the goods must be in the hands of the purchaser or of some one who can be treated as his servant or agent, and not in the hands of a mere intermediary . . . . It seems to me that the mere fact that the port of destination was left uncertain or was changed after the contract of sale, can make no difference. The principle is this—that where the vendor knows that he is delivering the goods to some one as carrier who is receiving them in that character, he delivers them with the implied right which has been established by the law, of stopping them so long as they remain in the possession of the carrier as carrier."

I give judgment for the defendants with costs.

The plaintiff appealed.

Feb. 24, 26, 27. *Charles Russell, Q.C.* (*Samuel Taylor*, with him), for the plaintiff. When goods, sent by the vendor, have reached the place indicated by the vendee for delivery, the transitus is at an end, and in the present case when the railway company received the goods as warehousemen, the transitus was concluded: the vendee did not indicate to the vendors any other destination of the goods than the reception of them by the defendants, Marshall Stevens & Co. The opinion of the majority of the judges in *Dixon* v. *Baldwen* (1) is a strong authority for the plaintiff; Lord Ellenborough, C.J., points out (2) that the right to stop is lost, when the goods have so far got to the end of their journey that they have to wait for new orders from the purchaser to put them again in motion, and to communicate to them another substantial destination, and that without such orders they would remain stationary. The only distinction between *Dixon* v. *Baldwen* (1) and the present case is, that in that case Metcalfe & Co., the agents of the buyers, had a warehouse of their own; but that is not a matter which makes a difference in point of principle. Mathew, J., relied upon some expressions in the judgment of James, L.J., in *Ex parte Rosevear China Clay Co.* (3); but the facts in that case were very different from those now before the Court; there the vendors themselves

(1) 5 East, 175. (2) 5 East, at p. 186.
(3) 11 Ch. D. 560, at p. 568.

had delivered the goods to the carrier (a shipowner) and stopped them whilst they were still in his hands; in the present case at the time of the stoppage the carriers (the railway company), to whom the vendors had delivered the goods, had carried them to the destination named by the vendee.

[BRETT, L.J. Possibly the proposition laid down by James, L.J., needs a little expansion.]

Ex parte Rosevear China Clay Co. (1) was really decided upon the authority of *Berndtson* v. *Strang* (2); and in the latter case the goods shipped were clearly stopped before reaching their destination.

[BRETT, L.J. So long as the delivery by the vendor to the vendee is only a delivery to a carrier as agent for the vendee, the right of stoppage in transitu remains, at least whilst the carrier holds the goods as carrier. I see that it has been held that delivery at a packer's warehouse on behalf of the vendee may defeat the right to stop in transitu: *Leeds* v. *Wright* (3); *Scott* v. *Pettit.* (4)]

In *Valpy* v. *Gibson* (5) the goods had been delivered to the vendee's agents to be exported, but at the time of his insolvency they had been sent back to the vendors in order to be repacked; nevertheless it was held by the Court of Common Pleas that the right to stop in transitu was at an end, and that the vendors could not retain the goods as against the vendee's assignees in bankruptcy.

Gully, Q.C., and *C. A. Russell*, for the defendants. The transit of the goods was not to terminate before Rouen; it is immaterial that during the journey there was a change of carriers, which involved a temporary warehousing of the goods.

[BRETT, L.J. In the present case the railway company held the goods, not as carriers, but as warehousemen.]

Marshall Stevens & Co. had the goods in their constructive possession as carriers immediately upon receiving the advice-note of the railway company. Their duty was to take charge of the goods and to put them on board a steamer for Rouen. If goods

(1) 11 Ch. D. 560, at p. 568.
(2) Law Rep. 4 Eq. 481; on appeal, 3 Ch. 588.
(3) 3 B. & P. 320.
(4) 3 B. & P. 469.
(5) 4 C. B. 837.

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remain in the hands of a forwarding agent for the vendee during a few days, they have not on that account come "home" to the hands of the vendee; they still remain in transit. Marshall Stevens & Co. did receive the goods as carriers or forwarding agents, and if they did not, they were holding them for the purpose of forwarding them. *Dixon* v. *Baldwen* (1) has been principally relied upon as supporting the plaintiff's case; but it is to be observed that Grose, J., dissented from the other members of the Court of King's Bench, and was of opinion that the right to stop in transitu was not at an end. *Dixon* v. *Baldwen* (1) and *Leeds* v. *Wright* (2) were commented upon by Bayley, J., in *Coates* v. *Railton* (3), and explained on the ground that in them the goods had reached the places of destination named by the buyers to the sellers. In *Gibson* v. *Carruthers* (4) the doctrine as to stoppage in transitu is thus explained by Rolfe, B.: "Where a vendor of goods has put them into the hands of a carrier, in order to their being by him forwarded and delivered to the vendee, then, if the vendee before actual delivery to him becomes insolvent, the vendor has a right to resume the possession with which he had previously parted. . . . I consider it to be of the very essence of" the doctrine as to stoppage in transitu, "that during the transitus the goods should be in the custody of some *third person* intermediate between the seller who has parted with, and the buyer who has not yet acquired, *actual* possession." It is evident that in order to enable the unpaid vendor to stop his goods, it is only necessary that they should not have reached the hands of the vendee or his servants. In *Rodger* v. *Comptoir d'Escompte de Paris* (5) it is said: "The transitus continues whilst" the goods "are in the charge of some third party contracted with as carrier for the purpose of forwarding them, and who has them in charge simply for this purpose." In the present case the defendants, Marshall Stevens & Co., had the goods in their charge simply for the purpose of forwarding them. To hold that the transit was at an end when the goods had reached their hands, would be contrary to *Ex parte Rosevear China Clay Co.* (6) The

(1) 5 East, 175.
(2) 3 B. & P. 320.
(3) 6 B. & C. 422.
(4) 8 M. & W. 321, at pp. 327, 328.
(5) Law Rep. 2 P. C. 393, at p. 404.
(6) 11 Ch. D. 560.

defendants rely also on *Ex parte Watson* (1), which was in fact decided upon the authority of *Rodger* v. *Comptoir d'Escompte de Paris.* (2) It is laid down in Benjamin on Sales, book v. part I. p. 702, 2nd ed.; p. 832, 3rd ed., that "goods may be still in transit, though lying in a warehouse to which they have been sent by the vendor on the purchaser's orders. Goods sold in Manchester to a merchant in New York, may be still in transit while lying in a warehouse in Liverpool." It has been contended that when the goods were warehoused by the railway company, the transitus was at an end; but this circumstance did not alter the character in which Marshall Stevens & Co. held the goods; they were carriers and nothing more; and even in the hands of a carrier goods are in a certain sense under the control of their owner: *Scothorn* v. *South Staffordshire Ry. Co.* (3); and yet it is a fundamental principle of the law as to stoppage in transitu, that an unpaid vendor may stop the goods in the hands of a carrier. The true view of the facts in the present case is that Rouen was the destination of the goods, and that from the time when they were delivered to the railway company, they were always in the hands of those who held them as carriers.

Samuel Taylor, in reply. There was no doubt an ulterior and subsequent transitus after the goods had reached Garston; but an ulterior and subsequent transitus does not alter the nature of the original transitus, even although it is communicated to the vendor. In the present case the transitus was at an end when the goods arrived at Garston and were warehoused by the railway company.

BRETT, L.J. During the argument of this case my mind has fluctuated a good deal: the facts present some difficulty; but in the result I feel myself bound to differ from the judgment of Mathew, J. I have hesitated much whether I ought to differ from him; but on considering the principles applicable to the case, I have come to a conclusion at variance with his decision.

The question is whether there has been a valid stoppage in

(1) 5 Ch. D. 35. (2) Law Rep. 2 P. C. 393.
(3) 8 Ex. 341.

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transitu. The doctrine as to stoppage in transitu is not founded on any contract between the parties: it is not founded on any ethical principle; but it is founded upon the custom of merchants. The right to stop in transitu was originally proved in evidence as part of the custom of merchants; but it has afterwards been adopted as a matter of principle, both at law and in equity. It is analogous to, but not the same as, the right of an unpaid vendor to retain the goods when the purchaser has become insolvent. If there has been a delivery of goods to the vendee and an appropriation of them to his own use, the right of stoppage does not exist: in a case of that kind the property in, and the possession of, the goods have passed to the vendee; but where the goods are in the course of transit from the vendor to the vendee, although the property has passed to the vendee, and although he has the constructive possession of them, the right to stop prevails. Where the goods have been appropriated by the vendor, and have been delivered by him to a carrier to be transmitted to the vendee, a constructive possession exists in the vendee: nevertheless, whilst the goods are in the hands of the carrier, they are in the course of transit, and the right of stoppage may arise. There is another kind of constructive possession by the vendee; that is, when the goods have been delivered by the carrier, and have reached the hands of an agent to the vendee to be held at his disposal. When the goods are in actual transit, hardly any difficulty occurs in determining the rights of the parties. But there may be a difficulty, when the goods are in the hands of an agent to be held by him at the disposal of the vendee: the goods may not have reached the end of the transit as originally contemplated, they may have come only to an intermediate stage. The question is not necessarily solved by what was said before the contract was entered into; but what was said may be a material fact to be considered, because it may determine where the transit ended. I think that the definition of the transitus is well given in Abbott on Merchant Ships and Seamen, part 3, ch. 9, p. 374 [5th ed.], and part 4, ch. 10, p. 409 [12th ed.]: the principle is there stated in the following terms: "Goods are deemed to be in transitu not only while they remain in the possession of the carrier, whether by water or land, and although such carrier

may have been named and appointed by the consignee; but also when they are in any place of deposit connected with the transmission and delivery of them, and until they arrive at the actual or constructive possession of the consignee." It is clear that the author, in the latter part of this definition, is alluding to the second kind of constructive possession: if the wording of the latter clause may be enlarged, I should prefer it to stand thus: "But also when they are in any place of deposit connected with the transmission and delivery of them, having been there deposited by the person who is carrying them for the purposes of transmission and delivery, until they arrive at the actual possession of the consignee, or at the possession of his agent, who is to hold them at his disposal and to deal with them accordingly."

In the present case the goods were purchased at Bolton of the defendants Ward & Co.: it was not part of the contract of sale that they should be sent to Garston. The vendee afterwards ordered that the goods should be sent to the defendants Marshall Stevens & Co., at Garston. He did not direct Ward & Co. to deliver the goods to Marshall Stevens & Co. in order that they might be sent to Rouen. If a direction of that kind had been given, the transit would have been from Bolton to Rouen; but the fact is widely different. Ward & Co., the vendors, gave no order to Marshall Stevens & Co.: the vendee gave the order to Marshall Stevens & Co. to forward them to Rouen. It has been argued that Marshall Stevens & Co. were only carrying agents; the truth is, that they were to act as agents for the vendee at Garston, and to keep them until the ship should be ready to sail. But I do not think it a material matter that they were to keep the goods: the point which makes the difference between this case and the cases relied upon by the defendants, is that Marshall Stevens & Co. received their instructions from the vendee and not from Ward & Co. I think it makes no difference whether the order from the vendee to Marshall Stevens & Co. was given before or after the order to the vendors. The case depends upon what was the transit: the goods were sent from the vendors to the vendee's agent; and when the goods have arrived at the end of the journey upon which they have been sent by the vendee's orders, and have been received by the vendee's agent upon his

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behalf, the right to stop is gone. From the moment when the goods were held by the railway company as warehousemen for Marshall Stevens & Co., they were under the control of the latter. Marshall Stevens & Co. had been instructed by the vendee, and from the moment that the goods were under their control they were in the constructive possession of the vendee. After that it was too late to stop in transitu.

I will not go through all the cases: it is sufficient to say that the facts before us fall within *Dixon* v. *Baldwen* (1) and *Valpy* v. *Gibson* (2), and not within *Rodger* v. *Comptoir d'Escompte de Paris* (3) and *Ex parte Watson* (4).

As *Coates* v. *Railton* (5) has been mentioned during the argument, I wish to say that that case is somewhat difficult of explanation; perhaps it may be explained on the same grounds as some other decisions; but if it cannot, I think the decision wrong.

I think that the judgment of Mathew, J., cannot be supported, and that Ward & Co. were not entitled to stop the goods in transitu.

COTTON, L.J. I have arrived at the same conclusion. The question is whether Ward & Co. had a right to stop in transitu; they were unpaid vendors, and claimed to exercise their lien as such. I will not go into the facts, as they have been already commented on by Brett, L.J.

So long as the goods have not been delivered, the right to stop in transitu remains; but in order to ascertain whether the right still exists it is necessary to look at the persons and the place to whom and at which, as between seller and buyer, the delivery is to be made. If the goods get into the hands of the buyer before reaching their destination, the right to stop is gone; for it is only when the goods are in actual transit that the seller can prevent their delivery. The goods, however, may be sent to an agent of the buyer to be held for him, and to be disposed of as he may direct: in a case like that the agent has no control over

(1) 5 East, 175.
(2) 4 C. B. 837.
(3) Law Rep. 2 P. C. 393.
(4) 5 Ch. D. 35.
(5) 6 B. & C. 422.

the goods except on behalf of the buyer, and he is merely employed to carry out the buyer's orders, and the right to stop is lost, because the goods have reached their destination and the transit as between buyer and seller is at an end. The transit from the seller to the buyer is the only one to be considered in determining whether the seller can exercise his right of stoppage. For this purpose it is immaterial that the buyer when the transit from the seller to him is at an end, starts them on to a fresh destination. This is a fresh transit, not from the seller to the buyer, but by or from the buyer. The principle is laid down by Bayley, J., in *Coates* v. *Railton* (1), where he says: "It is a general rule that where goods are sold to be sent to a particular destination named by the vendee, the right of the vendor to stop them continues until they arrive at that place of destination." Unless the voyage upon which the goods are sent from the vendor to the purchaser is interrupted, the right to stop remains till the end of that voyage is reached. Reference has been made to *Ex parte Rosevear China Clay Co.* (2) In that case the goods were put by the vendors on board a vessel chartered by the vendee at Fowey, the port named by him, the ultimate destination not being communicated to the vendors. But the master of the vessel received them only as carriers to a further point. Before the vessel started from the port of loading, the vendee committed an act of bankruptcy; and it was held in this Court that the vendors might lawfully stop the goods. In that case the putting the goods on board the vessel was an indication that the goods were to go on a voyage, which was not only unfinished but was not even begun. In that case the transit was not at an end; but Brett, L.J., and I guarded ourselves against extending the principle which we then acted upon to a case like this. Brett, L.J., said (3): "If the contract had been to deliver to the purchaser at Fowey, and the clay had been there delivered to him or his agent, and he or his agent had then shipped it, I should have thought that after that there would have been no transit." And I said (4): "If the contract had been to deliver the clay to an agent of the purchaser at Fowey, it would have been a very

(1) 6 B. & C. 422, at p. 425.
(2) 11 Ch. D. 560.
(3) 11 Ch. D. 569.
(4) 11 Ch. D. 672.

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different matter." In the present case the nature of the transaction has been as follows: the persons to receive the goods were the defendants, Marshall Stevens & Co., but they did not receive the goods in order to carry out the contract of sale, for that had been completed before the goods were forwarded to them. The goods were to remain in their possession, if no fresh impulse should be given by the purchaser. The transmission of the goods by Marshall Stevens & Co. to Rouen was a new journey, was a fresh voyage. The transit from the vendor to the purchaser had come to an end when the goods reached Messrs. Marshall Stevens & Co., and the unpaid vendor could not stop the goods. The facts before us come within the principle of *Dixon* v. *Baldwen*. (1) It is immaterial whether the order to send the goods to Rouen was given by the vendee to Marshall Stevens & Co. before or after the goods were sold by Ward & Son. In either case the order was given by the vendee to persons who were acting under his directions; and in order to defeat the right to stop in transitu, it is sufficient that the goods should have reached the hands of an agent for the vendee, to be held at his disposal.

BOWEN, L.J. I am of the same opinion. It has often been said that it is difficult to explain the ground upon which the right of stoppage in transitu rests. An explanation of the doctrine is given in the judgment of Lord Abinger, C.B., in *Gibson* v. *Carruthers* (2). The right of stoppage in transitu is founded upon mercantile rules, and is borrowed from the custom of merchants; from their custom it has been engrafted upon the law of England. The doctrine was at variance with the principles of the civil law, which laid down that although the goods had been sold upon credit, and although the goods were in the possession of the vendee, there might be recaption by the vendor if the vendee became insolvent. But according to the rules as to stoppage in transitu the goods can be stopped only whilst they are passing through channels of communication for the purpose of reaching the hands of the vendee. This doctrine was adopted by the Court of Chancery; and afterwards adopted by Courts of Common Law. It is difficult to say how long the transit of goods continues;

(1) 5 East, 175. (2) 8 M. & W. 321, at p. 336.

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but it is a rule accepted by English law that they can be stopped only during their transit to the vendee, and it is not to be forgotten that stoppage in transitu is an expansion of the ordinary rights of a vendor. The nature of the transit is explained by the passage which Brett, L.J., has read from Lord Tenterden's work. It is there pointed out that the goods are in transit until they reach the actual or constructive possession of the consignee. The transit is at an end when the vendee takes actual possession of them; it is at an end when some person acting on behalf of the vendee receives them from a carrier. The latter is an instance of constructive possession; and in the present case we have to decide whether the vendee has taken such constructive possession by his agents, Marshall Stevens & Co. The test to be applied, where delivery to the vendee is spoken of, is not what is thought, but what is done. In *Ex parte Watson* (1) it was held that the right to stop in transitu continued, because wherever it is part of the bargain between the vendor and the vendee that the transit shall last up to a certain time, the transit continues until that time has arrived. But when goods are bought to be afterwards despatched as the vendee shall direct, and it is not part of the bargain that the goods shall be sent to any particular place, in that case the transit only ends when the goods reach the place ultimately named by the vendee as their destination. In *Coates* v. *Railton* (2) several cases were cited by Bayley, J., in the course of his judgment, and the principle to be deduced from them is that, where goods are sold to be sent to a particular destination, the transitus is not at an end until the goods have reached the place named by the vendee to the vendor as their destination. One exception, at least, is to be found to the principle here laid down: the vendee can always anticipate the place of destination, if he can succeed in getting the goods out of the hands of the carrier. In that case the transit is at an end, whatever may have been said as to the place of destination, and this shews that the real test is not what is said but what is done. But it has never been decided that where the goods have reached the place of destination named to the vendor by the vendee, to be there held by an agent to the vendee at the vendee's disposal, the right to stop

(1) 11 Ch. D. 35. (2) 6 B. & C. 422.

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continues. If we were to decide for the defendants, we should go far beyond any previous case. As a question of fact, I find that the first complete transit or carriage of the goods ceased when the goods did arrive into the possession of Marshall Stevens & Co., who were acting as forwarding agents for the vendee. They were concerned both in taking delivery at this point from the previous carriers, and in a further carriage of the goods which was to be initiated by themselves; but the warehouse in which the goods in the interval were left was a warehouse between two distinct transits. Marshall Stevens & Co. were agents to forward to Rouen, but they were only agents to forward from Garston. The railway company were the vendee's carriers to carry from Bolton to Garston, and this was the transit so far as the vendors were concerned. When the goods reached Garston, and were held by the railway company on behalf of Marshall Stevens & Co., the right of the vendors to stop in transitu was lost.

Judgment reversed.

Solicitor for plaintiff: *R. W. Marsland, for Addleshaw & Warburton, Manchester.*

Solicitors for defendants: *Chester & Co., for Richardson, Bolton.*

J. E. H.

June 5.

VIVIAN *v.* LITTLE.

Practice—Inspection of Documents—Title Deeds in Custody of Court.

In an action of trespass to land brought against the committee of a lunatic whose title-deeds are in the custody of the Court having jurisdiction in Lunacy, an order on the defendant for inspection of the documents ought not to be made, as they are not in his possession or control.

APPEAL from chambers.

In an action of trespass to land brought against the defendant as committee of a lunatic, a master made an order that the plaintiff should have inspection of certain documents, otherwise the defendant to be precluded from putting the said documents in evidence at the trial of the action. This order was set aside with costs by order of Day, J., at chambers. It was admitted that the documents were title-deeds in the custody of the Court having jurisdiction in Lunacy.

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W. Pitt Lewis, for the plaintiff, moved to rescind the order of the learned judge.

Clement Higgins, for the defendant, shewed cause. The documents are not in the possession or control of the defendant or his agents. That is sufficient reason against the order for inspection. Where a defendant and a third person, not a party to the action, had possession of documents of title, the Court of Appeal refused to order inspection: *Kearsley* v. *Philips*. (1)

W. Pitt Lewis. In that case an order for inspection would have had to have been made against a person not a party to the action. Here an order on a party to the action is desired. He can at once apply for the documents to the Court which has them. But the plaintiff would have no locus standi to do so, and, moreover, ought not to be put to the expense of applying. A party is not excused from answering interrogatories on the ground that the information sought is beyond his own knowledge although in that of his servants, and he must obtain the information: *Bolckow* v. *Fisher* (2); so here, he must get the documents for inspection. In *Hutchinson* v. *Glover* (3) inspection was ordered of a private agreement between the defendant and third persons who had an interest in it.

POLLOCK, B. I think that, on principle and authority, no order for inspection should be made. It appears that the deeds are not in the possession of the defendant or his agent or other person under his control, but that they are in the possession of the Court having jurisdiction in Lunacy. Mr. Pitt Lewis has called our attention to two cases as distinct authorities: one is *Hutchinson* v. *Glover*. (3) But I do not think that the order there could be complained of, for this reason: where there is only one copy of an award or agreement, the party who has it holds it as much for the other party as himself, and is, when inspection is required of him, bound to go and ask the other party to let him produce it. The other case is *Bolckow* v. *Fisher*. (2) There interrogatories were administered to shipowners as to a loss at sea, and they said that they did not know the facts. But the Court said that

(1) 10 Q. B. D. 465. (2) 10 Q. B. D. 161.
(3) 1 Q. B. D. 138.

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this was not sufficient, and that the shipowners must shew that they had used all means in their power to obtain information. Otherwise, a partner sued and having but limited knowledge of the affairs of the partnership, might shelter himself by saying that he had only partial knowledge, and that his clerk knew more. Good authority for the distinction between the two cases and the present one may be found in *Murray* v. *Walter* (1), where Lord Cottenham said, "It is perfectly true that, if documents are in the hands of an agent, the principle of the Court is, that the possession of the defendant's agent is the possession of the defendant, against whom the order is made," and the Court will order production. But not so if the possession is limited, or the defendant has not possession of the documents either personally or through an agent.

Here the document is in the Court having the management of the lunatic's estate, and I think that the refusal of the learned judge to order inspection was right, and that the appeal from it must be dismissed with costs.

LOPES, J. Suppose this Court were to confirm the master's order for inspection, and set aside that of my Brother Day, it would be unjust, for the defendant could not obey the order for inspection, because he has not the deeds in his possession and cannot produce them. They are in the custody and control of a Court. It is said that he can make an application to that Court, and so get the deeds into his possession. But who wants the inspection? The plaintiff. If he wants it why is he to cast the onus of making the application on the defendant? I think that the proper person to apply is the plaintiff himself. Whether such an application would be successful or not I cannot say, being unfamiliar with the practice of the Court in Lunacy; but I should suppose that the Court would unhesitatingly accede to it.

Appeal dismissed with costs.

Solicitors for plaintiff: *Gregory, Rowcliffes, & Co.*
Solicitor for defendant: *Henley Grose Smith.*

(1) Cr. & P. 114.

J. R.

IN RE BRADFORD, THURSBY, AND FARISTS. 1883 June 5.

Costs—Order on Solicitor personally to pay—Appeal—Judicature Act, 1873, s. 49.

An order that the costs of an application at chambers on behalf of a client shall be paid by his solicitor personally is within the Judicature Act, 1873, s. 49, and therefore not subject to any appeal, except by leave.

Affirmed on appeal 17th July 1883 C.A.

APPEAL from chambers.

An application was made by G. S. Hare, a solicitor, on behalf of a client, to a master at chambers, for an order that the bill of the respondent solicitors should be delivered and referred to a master for taxation. The master made an order for delivery of the bill only, dismissing the rest of the application "with costs to be taxed and paid by G. S. Hare, solicitor, personally." On appeal against the order as to costs, Day, J., also dismissed the application with costs to be taxed and paid by G. S. Hare, solicitor, personally.

Mirams, for Hare, moved to set aside the order on him to pay costs. This appeal lies. Although the order is "as to costs only," it is not within s. 49 of the Judicature Act, 1873: *Witt* v. *Corcoran*. (1) There is no jurisdiction to make the solicitor personally pay costs. *In re Clements* v. *Erlanger* (2) Malins, V.C. ordered a solicitor to pay the costs of a motion to commit him for contempt, and an appeal was heard and allowed by the Court of Appeal. The rule applies to parties, but not to costs imposed as a penalty on a solicitor under the jurisdiction exercised by the Court over its officers.

[LOPES, J., referred to *Taylor* v. *Dowlen* (3) and *In re Hoskin's Trusts*. (4)]

The trustees directed to pay costs in those cases were parties.

Secondly. If the appeal lies and the power to order costs is discretionary, the discretion must be exercised on some prin-

(1) 2 Ch. D. 69.
(2) 46 L. J. (Ch. D.) 375.
(3) Law Rep. 4 Ch. 697.
(4) 6 Ch. D. 281.

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ciple, and the principle is that the solicitor must have been guilty of improper conduct, which is not alleged in this case.

Morton Daniel, for Bradford,
Page, for Farists,
Chapman, for Thursby,
} were not called upon to argue.

POLLOCK, B. The master had power to make the order as to costs, for he had the same power as a judge in chambers, and a judge in chambers has the same power as the Court, and the Court has power to exercise its jurisdiction over its officers and to order that costs shall be paid by them personally. That order came before Day, J., who took the same view as the master, and dismissed the application "with costs to be paid by G. S. Hare, solicitor, personally." The objection is taken that this is a case in which there is no appeal. That must depend on the true construction of s. 49 of the Judicature Act, 1873: "No order made by the High Court of Justice or any judge thereof, by consent of parties, or as to costs only, which by law are left to the discretion of the Court, shall be subject to any appeal, except by leave of the Court or judge making such order." The question for us is whether, in the particular case, the order is "as to costs only which by law are left to the discretion of the Court." The rule does not say "which under this Act are left to the discretion of the Court, but "which by law are left to the discretion of the Court." Therefore, in any case of exercise of pure discretion, whether under this Act or under the old law of this Court as to costs, there is no appeal. The power to order a solicitor to pay costs out of his own pocket is only commensurate with the power to order costs in other cases. It is essential to the jurisdiction of the Court, and a power without which the Court could but very imperfectly exercise jurisdiction. The former practice was this: That if the order for costs was part and in pursuance of a general order, as in the case of a finding for the plaintiff or defendant on the matter in controversy, there was an appeal as to the general finding, and as the costs were merely appendages, the appeal included the question of costs. But the cases of costs go further. They are collected in Morgan on Costs, 2nd ed.

In equity, the question often arises whether costs are payable out of a particular fund. So important is it, that various rules have been from time to time laid down by the Courts. Therefore, where an order was made for payment of costs out of a particular fund in Court and that order was contrary to the well-known rules of equity, there was an appeal, though for costs alone, p. 160. Again, where there is some absolute rule of practice that costs shall be paid by one or the other party an appeal has been allowed; but where trustees, even before the Judicature Act, have been ordered to pay costs out of their own pocket, the Courts have distinctly refused to interfere: *Taylor* v. *Dowlen* (1), and *In re Hoskin's Trusts* (2), are cases to that effect. I have no doubt that the present is a case in which the discretion of the master and of the learned judge was exercised under the general principle by which the question of costs and the distribution of costs is by law left to the discretion of the Court, and, therefore, that in this case there is no appeal.

LOPES, J. By an order of a master, affirmed by Day, J., at chambers, a solicitor, acting for a client, was ordered to pay costs out of his own pocket. No doubt the Court, or a judge, or a master has power to make such an order, because the solicitor is an officer of the Court. That order made at chambers has been appealed from, and the question for us is simply whether an appeal will lie or not, having regard to the words of s. 49 of the Judicature Act, 1873. Does this appeal come within the ordinary popular meaning of those words? I think that it does, and that this is an appeal "as to costs only," and also that it is an appeal as to costs only, "which by law are left to the discretion of the Court." It is said that this is not the true construction of s. 49, and that the Legislature intended to deal only with costs as between party and party. I cannot put such a limited construction on the words. If the Legislature so intended, it would, at least, have intimated such intention by the words used. But the words used are amply sufficient to include the present case. Moreover, when we turn to the authorities, we find one strongly opposed to this appeal. It is a case analogous to the case of solicitors, in

(1) Law Rep. 4 Ch. 697. (2) 6 Ch. D. 281.

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which trustees—no doubt parties to the suit but having no personal interest in it—were ordered to pay costs out of their own pockets. In *Taylor* v. *Dowlen* (1) before the Judicature Acts, it was held that an order that trustees shall pay the costs of a suit personally forms no exception to the general rule that no appeal will be allowed for costs. But it is important to observe how that case was treated in the case, since the Judicature Acts, of *In re Hoskin's Trusts* (2), by James, L.J., who said: "It is settled by *Taylor* v. *Dowlen* (1), which is a decision precisely in point, and has never been disputed or overruled, that a case where a trustee has been deprived of costs for impropriety of conduct is no exception from the general rule that an appeal for costs alone will not lie," and Brett, L.J., said, "If this had been a case in which an appeal would lie before the Judicature Act, I think that the Act would have prevented an appeal. But the case, apart from the Act, is governed by *Taylor* v. *Dowlen*. (1)"

Those decisions support our conclusion in this case that the costs in question are within s. 49, and that there is no appeal.

Appeal dismissed with costs as against Mr. Hare.

Solicitor for Bradford: *Bradford.*
Solicitor for Thursby: *Thursby.*
Solicitors for Farists: *James, Son, & James.*

(1) Law Rep. 4 Ch. 697. (2) 6 Ch. D. 281, at p. 283.

J. R.

[IN THE COURT OF APPEAL.]

1883
July 3.

IN RE SUTTON & ELLIOTT.

Solicitor—Bill of Costs—Order for Delivery of Bill after Payment—6 & 7 Vict. c. 73, s. 41.

Where twelve calendar months have elapsed since payment of a solicitor's bill of costs by his client, such bill, although not signed by the solicitor, is prohibited by 6 & 7 Vict. c. 73, s. 41, from being referred to taxation.

APPEAL by Messrs. Sutton & Elliott, who are solicitors, from an order of the Queen's Bench Division ordering them to deliver to James Joseph Bleackley their bill of costs in all matters wherein they had been concerned for him.

It appeared from the affidavits that at various times during 1877 and the three following years, three bills of the costs of the appellants against the said J. J. Bleackley had been sent to him. They were not signed nor had they been paid, but the appellants had from time to time stopped for such costs moneys of the said J. J. Bleackley which had come to their hands as his solicitors. It is not necessary, for the purpose of this report, to refer any further to these first three bills or to the argument respecting them.

In August, 1881, Mr. J. Hill, of Manchester, became Mr. Bleackley's solicitor, and the appellants ceased to act as solicitors for him.

On the 1st of November, 1881, four bills of costs against Mr. Bleackley were made out and delivered by the appellants to Mr. Hill as Mr. Bleackley's solicitor, together with a cash account giving credit for all moneys received by them on his behalf. These last four bills amounted together to 109*l.* 19*s.* 6*d.*, and after giving credit for that amount there appeared in such cash account 162*l.* 1*s.* 5*d.* as the balance due to Mr. Bleackley, and such 162*l.* 1*s.* 5*d.* was then paid by the appellants on the 1st of November, 1881, to Mr. Hill as Mr. Bleackley's solicitor, and in Mr. Bleackley's presence. Neither of these last four bills were signed by the appellants, and one of the questions was whether the order appealed from was good as regards such last four bills,

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the summons requiring the appellants to deliver their bill of costs having been taken out on the 16th of February, 1883, more than twelve calendar months, therefore, after the 1st of November, 1881, when the amount of these four bills was paid.

Smyly, for the appellants. The question turns on the construction of s. 41 of 6 & 7 Vict. c. 73 (1), which prohibits the power of ordering the taxation of a bill of costs when twelve months have elapsed since payment. "Such bill" in that section does not mean a signed bill of costs, for a client may have a bill of costs taxed which has not been signed: *Re Pender* (2).

Murphy, Q.C. (*Tatlock*, with him), for the respondent. "Payment," in s. 41 of 6 & 7 Vict. c. 73, means payment of a bill of costs which has been signed by the solicitor, as required by s. 37 of that Act. That is the "such bill" to which s. 41 refers.

BRETT, M.R. In this case there is no reason why the first three bills of costs should not be ordered to be delivered and taxed, for they were not signed nor were they paid. As regards the last four bills, a debtor and creditor account was handed to the client, or rather to Mr. Hill, his solicitor, which is more important, and in such account, after taking into the account these four bills, a balance was shewn in favour of the client, and the amount of that balance was paid to such solicitor, who accepted the balance as correct, and took the money for it, so there was that which was equivalent to payment of these bills, and more than twelve months elapsed after such payment before application was made for delivery of a bill, and the only question now is whether that has prevented an order being made for the delivery of these last four bills, and in my opinion it has. As I understand, the Divisional Court were of opinion that s. 41 of 6 & 7 Vict. c. 73,

(1) Sect. 41 of 6 & 7 Vict. c. 73, enacts, "That the payment of any *such* bill as aforesaid shall in no case preclude the Court or a judge to whom application shall be made, from referring such bill for taxation, if the special circumstances of the case shall, in the opinion of such Court or judge, appear to require the same, upon such terms and conditions, and subject to such directions, as to such Court or judge shall seem right, provided the application for such reference be made within twelve calendar months after payment."

(2) 2 Ph. 69.

which speaks of "payment of any *such* bill," has reference only to a bill signed by the solicitor, but, in my opinion, it has a general reference to all bills of costs which are mentioned in the previous part of the Act, whether signed or not, and therefore, "any such bill" in s. 41 includes an unsigned bill, and consequently, if it has been paid, and more than a year has afterwards elapsed, it cannot be ordered for taxation. Otherwise, after a bill of costs has been delivered and paid and settled, a client may, at any time afterwards have the whole matter re-opened, because the bill was not a signed one. This ought not to be done, and, for the reasons given, I think we cannot order a delivery of these last four bills.

FRY, L.J. I am of the same opinion. I desire only to add a few words to what the Master of the Rolls has said upon the last point. Sect. 37 of 6 & 7 Vict. c. 73 deals with unpaid bills, whilst s. 41 deals with paid bills. Now the first introduction of a bill of costs in this Act is in s. 37 which commences with enacting that no solicitor shall commence any action "for the recovery of any fees, charges, or disbursements for any business done" by such solicitor, until one month after he has delivered "a bill of such fees, charges, and disbursements." It appears to me that the words "any such bill" in s. 41 refer back to that part of s. 37 where the subject of a bill of costs at all is first introduced, and that the expression "any such bill" in s. 41, means any "bill of such fees, charges, and disbursements." The result therefore is, if any such bill has been paid it cannot be opened except in the manner pointed out by that 41st section, and consequently the application to refer it to taxation must be made within twelve months after payment.

Order accordingly.

Solicitors for appellants: *Chester, Mayhew, Broome, & Griffithes.*
Solicitor for respondent: *Stephen E. Lambert.*

W. P.

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March 12.

[IN THE COURT OF APPEAL.]

CASTELLAIN *v.* PRESTON AND OTHERS.

Insurance (Fire)—Contract of Indemnity—Vendor and Purchaser—Insurance by Vendor—Fire after Contract for Sale, but before Completion—Right to Insurance Moneys—Subrogation.

According to the doctrine of subrogation, as between the insurer and the assured, the insurer is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been, exercised, or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be or has been diminished.

A vendor contracted with a purchaser for the sale, at a specified sum, of a house, which had been insured by the vendor with an insurance company against fire. The contract contained no reference to the insurance. After the date of the contract, but before the date fixed for completion, the house was damaged by fire, and the vendor received the insurance-money from the company. The purchase was afterwards completed, and the purchase-money agreed upon, without any abatement on account of the damage by fire, was paid to the vendor :—

Held, in an action by the company against the vendor, that the company were entitled to recover a sum equal to the insurance-money from the vendor for their own benefit.

Judgment of Chitty, J. (8 Q. B. D. 613), reversed.

APPEAL of the plaintiff from the judgment of Chitty, J., in favour of the defendants. The facts are fully stated in the report of the proceedings before Chitty, J. (1), and it is necessary here only to briefly recapitulate them.

The plaintiff sued on behalf of the London, Liverpool, and Globe Insurance Company to recover a sum of 330*l.* with interest since the 25th of September, 1878. On the 25th of March, 1878, the defendants, as owners of certain lands and buildings in Liverpool, effected an insurance on the buildings against loss by fire, and they kept the policy on foot by payment of the

(1) 8 Q. B. D. 613.

premiums until after the fire hereinafter mentioned occurred. The policy was in the usual form, giving the insurers the option of reinstating the property. On the 31st of July, 1878, the defendants contracted to sell the land and the buildings to their tenants, Messrs. Rayner, for the sum of 3100*l.*, and they received a deposit. The contract provided that the time of the completion should be such day within two years from the date as the vendors should name. On the 15th of August in the same year a fire occurred damaging part of the buildings. A claim was made on behalf of the defendants, and after negotiation as to the sum to be paid, the amount of the claim was ultimately fixed at 330*l.*, and that sum was in fact paid on the 25th of September, 1878, by the insurers, who were at that time ignorant of the existence of the contract for sale. On the 25th of March, 1879, the defendants named the 5th of May as the day of completion, and on the following 12th of December the conveyance was executed and the balance of the purchase-money paid.

The present action was commenced on the 31st of October, 1881.

March 6, 10, 12. *Charles Russell, Q.C.*, and *A. Aspinall Tobin*, for the plaintiff. A policy of fire-insurance is a contract of indemnity, and the assured cannot derive a profit because the thing insured has been damaged by the peril insured against: *Darrell* v. *Tibbitts*. (1) The insurer, who pays the sum insured, is entitled to every benefit whereby the loss is diminished: *Randal* v. *Cockran* (2). The defendants having received the agreed amount of the purchase-money without any abatement, must be considered to stand in the same position as a ship-owner, who, although he has received the amount due upon a policy of insurance after the happening of a loss, refuses to give up the salvage to the underwriters; but it is clear law that the assured cannot withhold the salvage from the insurer: 2 Arnould on Marine Insurance, part 3, ch. 6, pp. 935, 936 (5th ed.) The decision of the House of Lords in *Burnand* v. *Rodocanachi* (3), is not at variance with the authorities above cited; in that case what the ship-

(1) 5 Q. B. D. 560.
(2) 1 Ves. Sen. 98.
(3) 5 C. P. D. 424; 6 Q. B. D. 633; 7 App. Cas. 333.

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owners had received pursuant to the Act of Congress of the United States was a pure gift; it did not accrue to them by way of salvage, and therefore they were entitled to hold it as against the underwriters.

In delivering judgment, Chitty, J., relied much on two cases decided in American Courts: *King* v. *State Mutual Fire Insurance Co.* (1) and *Suffolk Fire Insurance Co.* v. *Boyden.* (2) But they were decisions depending upon the law as to mortgagors and mortgagees, and moreover were pronounced in the Courts of one state (Massachusetts). Many American cases of a contrary tendency may be cited: *Tyler* v. *Ætna Fire Insurance Co.* (3); *Ætna Fire Insurance Co.* v. *Tyler* (4); *Kernochan* v. *New York Bowery Fire Insurance Co.* (5); *Insurance Co.* v. *Woodruff.* (6) The defendants could not have recovered upon the policy, after they had executed the conveyance to the purchasers; they then stood in a different position from the unpaid vendor of goods, who retains them in his possession under his lien, and who may have an insurable interest sufficient to support a marine policy; for it depends upon the words used, who has the right to sue in the event of a loss; but even in the case of marine policies the insurance is for the benefit of the person actually interested; it is the interest which is insured, not the goods themselves.

[BRETT, L.J. It may be said that the goods themselves are insured, but the assured can recover only to the extent of his interest.]

If the defendants could not recover upon the policy for a loss happening after the conveyance to the purchasers, surely they cannot keep the money paid by the plaintiff's company for a loss happening before the conveyance but after the entering into the contract of sale, they having received the purchase-money without any abatement. The purchase having been completed, it must be taken that the defendants had no interest in the house at the time when the fire occurred; and it is a rule of insurance-law that the assured can only recover to the extent of his interest; thus, if a tenant for life and a remainderman insure a house

(1) 7 Cush. Mass. 1.
(2) 9 All. Mass. 123.
(3) 12 Wend. (N.Y.) 507.
(4) 16 Wend. (N.Y.) 385.
(5) 17 N. Y. 428, 441.
(6) 2 Dutcher, 541, 551.

against fire, each, upon a loss happening, can recover only the value of his interest: per Mellish, L.J., in *North British and Mercantile Insurance Co.* v. *London, Liverpool, and Globe Insurance Co.* (1)

[COTTON, L.J. That dictum of Mellish, L.J., is against the view of James, L.J., in *Rayner* v. *Preston.* (2)]

Gully, Q.C., and *W. R. Kennedy*, for the defendants. No doubt a contract of insurance is primâ facie a contract of indemnity, and the insurer is entitled to be subrogated into those rights of the assured which arise out of contracts entered into with respect to the preservation of the subject-matter of insurance: *Darrell* v. *Tibbits* (3) is a decision founded upon this principle, but it does not apply to the facts now before the Court. The contract for the sale of the house was not a contract with respect to its maintenance in good condition and to its preservation from destruction by fire. The present defendants were unpaid vendors at the time when the loss happened, and the plaintiff's company could have had no defence to an action upon the policy: *Collingridge* v. *Royal Exchange Assurance Corporation* (4); and it is immaterial that at the time of payment upon the policy the defendants' interest in the property would speedily cease: in *Simpson* v. *Scottish Union Insurance Co.* (5) it was laid down by Wood, V.C.: "I agree that a tenant from year to year, having insured, would have a right to say that the premises should be rebuilt for him to occupy, and that his insurable interest is not limited to the value of his tenancy from year to year." Suppose that a tenant has contracted to buy a house at the landlord's option for a fixed price, and that the house is afterwards burned down; and suppose that the landlord having insured it, receives its value from the company: is the landlord bound to compel the tenant to purchase the house, and is the landlord bound to reimburse the insurance company out of the price received from the tenant? Suppose that the plaintiff's company had reinstated the house instead of paying the amount of the damage, could the cost of reinstating it be recovered back from

(1) 5 Ch. D. 569, at p. 583.
(2) 18 Ch. D. 1, at p. 15.
(3) 5 Q. B. D. 560.
(4) 3 Q. B. D. 173.
(5) 1 H. & M. 618, at p. 628.

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the defendants after the completion of the purchase? It is the logical conclusion of the argument for the plaintiff that both these questions must be answered in the affirmative; but surely this is unreasonable. No doubt an insurer can take advantage of all contracts relating to the loss, and of all contracts which give a remedy upon the happening of the loss; but the contract to sell the defendants' house was not of this kind; it was wholly unconnected with the loss; it was independent of it, or at least collateral to it.

[BOWEN, L.J. Can any authority be adduced for the restriction upon an insurer's rights which is now contended for?]

No; but the argument for the plaintiff has never before been advanced. It is plain from the reasoning of the Law Lords in *Simpson* v. *Thomson* (1), that an insurer is only subrogated to those rights which may be enforced against third persons in respect of the loss: in the present case the defendants, as vendors, had no rights as against the purchasers in respect of the loss; for a contract of sale is quite distinct from a contract of insurance: *Edwards* v. *West.* (2) A fire policy is not quite a contract of indemnity, and a distinction exists between fire insurances and marine insurances; but it has been held that even a marine policy is not a complete contract of indemnity: *Aitchison* v. *Lohre.* (3) The plaintiff cannot rely upon *Randal* v. *Cockran* (4), because that relates to a totally different subject-matter, namely, reprisals at sea. It may be that *Brooks* v. *MacDonnell* (5) is distinguishable on the ground of compromise; but in that case the assured undoubtedly got more than an indemnity. A gift is not to be taken into account between the assured and the insurer as diminishing the loss: *Burnand* v. *Rodocanachi* (6); and in the present case why should any part of the purchase-money be thus treated? With respect to the American cases it may be that the only cases supporting the contention of the defendants were decided in the State of Massachusetts; but they appear to be approved of in 2 Phillips on Insurance, ch. 17, s. 17, p. 384 (5th ed.)

(1) 3 App. Cas. 279.
(2) 7 Ch. D. 858.
(3) 4 App. Cas. 755.
(4) 1 Ves. Sen. 98.
(5) 1 Y. & C. (Ex.) 500.
(6) 7 App. Cas. 333.

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[BRETT, L.J. The result of the American cases is that only two are in favour of the defendants, whilst there are many in favour of the plaintiff.]

The doctrine of subrogation only applies where the insurer can bring an action in the name of the assured: here the defendants have received no money for the use of the plaintiff company, and therefore no action for money had and received will lie against them.

Aspinall Tobin, in reply, was stopped.

BRETT, L.J. In this case the action is brought by the plaintiff as representing an insurance company against the defendants in respect of money which has been paid by that company to the defendants on account of the loss by fire of a building. The defendants were the owners of property consisting partly at all events of a house, and the defendants had made a contract of sale of that property with third persons, which contract upon the giving of a certain notice as to the time of payment would oblige those third persons, if they fulfilled the contract, to pay the agreed price for the sale of that property, a part of which was a house, and according to the peculiarity of such a sale and purchase of land or real property the vendees would have to pay the purchase-money, whether the house was, before the date of payment, burnt down or not. After the contract was made with the third persons, and before the day of payment, the house was burnt down. The vendors, the defendants, having insured the house in the ordinary form with the plaintiff's company, it is not suggested that upon the house being burnt down the defendants had not an insurable interest. They had an insurable interest, as it seems to me, first, because they were at all events the legal owners of the property; and, secondly, because the vendees or third persons might not carry out the contract, and if for any reason they should never carry out the contract, then the vendors, if the house was burnt down, would suffer the loss. Upon the happening of the fire the defendants made a claim on the insurance company represented by the plaintiff, and were paid a certain sum which represented the damage done to the house. After that, the contract of sale between the defendants

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and the third persons, the vendees of the property, was carried out, and the full amount of the purchase-money was paid by the third persons to the defendants notwithstanding the fire. Under those circumstances the plaintiff representing the insurance company brings this action; I do not say that he brings it to recover back the money which has been paid by the insurance company (for that expression of opinion would rather interfere with the form of the action), but he brings the action in respect of that money.

The question is whether this action is maintainable. The case was tried before Chitty, J., and he, in a very careful and elaborate judgment (1), has come to the conclusion that the insurance company cannot recover against the defendants in respect of the money paid by them. It seems to me that the foundation of his judgment is this, that he considers that the doctrine of subrogation of the insurer into the position of the assured is confined within limits, which prevent it from extending to the present case. I must now consider whether I can agree with him.

In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the Courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.

In the course of this discussion many propositions and rules well known in insurance law have been glanced at. For instance, to speak of marine insurance, the doctrine of a constructive total loss originated solely to carry out the fundamental rule which I

(1) 8 Q. B. D. 613, at p. 615.

have mentioned. It was a doctrine introduced for the benefit of the assured; for, as a matter of business, a constructive total loss is equivalent to an actual total loss; and if a constructive total loss could not be treated as an actual total loss, the assured would not recover a full indemnity. But grafted upon the doctrine of constructive total loss came the doctrine of abandonment, which is a doctrine in favour of the insurer or underwriter, in order that the assured may not recover more than a full indemnity. The doctrine of constructive total loss and the doctrine of notice of abandonment engrafted upon it were invented or promulgated for the purpose of making a policy of marine insurance a contract of indemnity in the fullest sense of the term. I may point out that the doctrine of notice of abandonment is most difficult to justify upon principle; it was introduced, rather as a matter of justice in favour of the underwriters, so as to prevent the assured from obtaining by fraud more than a full indemnity. That doctrine is to a certain extent technical, that is to say, although the assured has in reality suffered a constructive total loss, and although he is upon general principles entitled to recover, nevertheless he must fail unless he has given a notice of abandonment. I suppose that the doctrine of notice of abandonment was originally introduced by merchants and underwriters, and afterwards adopted as part of the law as to marine insurance; but at first sight it seems a mere encroachment of the judges.

I have mentioned the doctrine of notice of abandonment for the purpose of coming to the doctrine of subrogation. That doctrine does not arise upon any of the terms of the contract of insurance; it is only another proposition which has been adopted for the purpose of carrying out the fundamental rule which I have mentioned, and it is a doctrine in favour of the underwriters or insurers in order to prevent the assured from recovering more than a full indemnity; it has been adopted solely for that reason. It is not, to my mind, a doctrine applied to insurance law on the ground that underwriters are sureties. Underwriters are not always sureties. They have rights which sometimes are similar to the rights of sureties, but that again is in order to prevent the assured from recovering from them more than a full indemnity. But it being admitted that the doctrine of subrogation is to be applied

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merely for the purpose of preventing the assured from obtaining more than a full indemnity, the question is, whether that doctrine as applied in insurance law can be in any way limited. Is it to be limited to this, that the underwriter is subrogated into the place of the assured so far as to enable the underwriter to enforce a contract, or to enforce a right of action? Why is it to be limited to that, if when it is limited to that, it will, in certain cases, enable the assured to recover more than a full indemnity? The moment it can be shewn that such a limitation of the doctrine would have that effect, then, as I said before, in my opinion, it is contrary to the foundation of the law as to insurance, and must be wrong. And, with the greatest deference to my Brother Chitty, it seems to me that that is the fault of his judgment. He has by his judgment limited this doctrine of subrogation to placing the insurer in the position of the assured only for the purpose of enforcing a right of action, to which the assured may be entitled. In order to apply the doctrine of subrogation, it seems to me that the full and absolute meaning of the word must be used, that is to say, the insurer must be placed in the position of the assured. Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavour to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished. That seems to me to put this doctrine of subrogation in the largest possible form, and if in that form, large as it is, it is short of fulfilling that which is the fundamental condition, I must have omitted to state something which ought to have been stated. But it will be observed that I use the words "of every right of the assured." I think that the rule does require that

limit. In *Burnand* v. *Rodocanachi* (1) the foundation of the judgment to my mind was, that what was paid by the United States Government could not be considered as salvage, but must be deemed to have been only a gift. It was only a gift to which the assured had no right at any time until it was placed in their hands. I am aware that with regard to the case of reprisals, or that which a person whose vessel had been captured got from the English Government by a way of reprisal, the sum received has been stated to be, and perhaps in one sense was, a gift of his own Government to himself, but it was always deemed to be capable of being brought within the range of the law as to insurance, because the English Government invariably made the "gift," so invariably, that as a matter of business it had come to be considered as a matter of right. This enlargement, or this explanation, of what I consider to be the real meaning of the doctrine of subrogation, shews that in my opinion it goes much further than a mere transfer of those rights which may at any time give a cause of action either in contract or in tort, because if upon the happening of the loss there is contract between the assured and a third person, and if that contract is immediately fulfilled by the third person, then there is no right of action of any kind into which the insurer can be subrogated. The right of action is gone; the contract is fulfilled. In like manner if upon the happening of a tort the tort is immediately made good by the tort feasor, then the right of action is gone; there is no right of action existing into which the insurer can be subrogated. It will be said that there did for a moment exist a right of action in favour of the assured, into which the insurer could have been subrogated. But he cannot be subrogated into a right of action until he has paid the sum insured and made good the loss. Therefore innumerable cases would be taken out of the doctrine, if it were to be confined to existing rights of action. And I go further and hold that if a right of action in the assured has been satisfied, and the loss has been thereby diminished, then, although there never was nor could be any right of action into which the insurer could be subrogated, it would be contrary to the doctrine of subrogation to say that the loss is not to be diminished as

(1) 7 App. Cas. 333.

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between the assured and the insurer by reason of the satisfaction of that right. I fail to see at present if the present defendants would have had a right of action at any time against the purchasers, upon which they could enforce a contract of sale of their property whether the building was standing or not, why the insurance company should not have been subrogated into that right of action. But I am not prepared to say that they could be, more particularly as I understand my learned Brother, who knows much more of the law as to specific performance than I do, is at all events not satisfied that they could. I pass by the question without solving it, because there was a right in the defendants to have the contract of sale fulfilled by the purchasers notwithstanding the loss, and it was fulfilled. The assured have had the advantage therefore of that right, and by that right, not by a gift which the purchasers could have declined to make, the assured have recovered, notwithstanding the loss, from the purchasers, the very sum of money which they were to obtain whether this building was burnt or not. In that sense I cannot conceive that a right, by virtue of which the assured has his loss diminished, is not a right which, as has been said, affects the loss. This right which was at one time merely in contract, but which was afterwards fulfilled, either when it was in contract only, or after it was fulfilled, does affect the loss; that is to say, it affects the loss by enabling the assured, the vendors, to get the same money which they would have got if the loss had not happened.

While I am applying the doctrine of subrogation which I have endeavoured to enunciate, I think it due to Chitty, J., to point out what passages in his judgment require some modification. (1) I find him reading this passage: "I know of no foundation for the right of underwriters, except the well known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or re-imbursed himself for the loss." That is a quotation from Lord Cairns in *Simpson* v. *Thomson*. (2) The learned judge then goes on, "What is the principle of subrogation? On payment the insurers are entitled to enforce all the

(1) 8 Q. B. D. at p. 617. (2) 3 App. Cas. 279, at p. 284.

remedies, whether in contract or in tort, which the insured has against third parties, whereby the insured can compel such third parties to make good the loss insured against." That is, as it seems to me, to confine this doctrine of subrogation to the principle that the insurers are entitled to enforce all remedies, whether in contract or in tort. I should venture to add this—"and if the assured enforces or receives the advantage of such remedies, the insurers are entitled to receive from the assured the advantage of such remedies." Then when we come to this illustration, "Where the landlord insures, and he has a covenant by the tenant to repair, the insurance office, on payment in like manner, succeeds to the right of the landlord against his tenant:" I would add this—"and if the tenant does repair, the insurer has the right to receive from the assured a benefit equivalent to the benefit which the assured has received from such repair." Then, dealing with the case of *Burnand* v. *Rodocanachi* (1), the learned judge cites the opinion of Bramwell, L.J. (2) He says that Bramwell, L.J., in his judgment held that it was not salvage, but "that in the circumstances the sum received by the shipowner was but a pure gift, and there was no right on the part of the insurers to recover any part of it over against him." I, for myself, venture to add this as the reason, "because there was no right in the assured to demand the compensation from the American Government." There was no right to demand it, it was bestowed and received as a pure gift. *Darrell* v. *Tibbitts* (3) seems to me to be entirely in favour of the plaintiff in this case. I shall not retract from the very terms which I used in that case. It seems to me that in *Darrell* v. *Tibbitts* (3) the insurers were not subrogated to a right of action or to a remedy. They were not subrogated to a right to enforce the remedy, but what they were subrogated into was the right to receive the advantage of the remedy which had been applied, whether it had been enforced or voluntarily administered by the person who was bound to administer it. That seems to me to be the doctrine. Then with regard to the passage (4) "The doctrine is well established that where something is insured against loss, either in a marine or a fire policy, after the assured

(1) 7 App. Cas. 333.
(2) 8 Q. B. D. at p. 618.
(3) 5 Q. B. D. 560.
(4) 5 Q. B. D. at p. 563.

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has been paid by the insurers for the loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject-matter insured." I wish to explain that that was a distinct clause, and it was so intended by me when I stated it. I then mentioned contracts: "And with regard to every contract which touches the subject-matter insured, and which contract is affected by the loss or the safety of the subject-matter insured by reason of the peril insured against." I fail to conceive any contract which gives a right over the thing insured, which is not affected by the loss or safety of it, and if it is necessary to bring the present case within those terms, it seems to me that the contract of purchase and sale was affected by that loss. I will not go further with the judgment of Chitty, J., except to say this, that at the end my learned Brother has put it thus, that "the only principle applicable is that of subrogation as understood in the full sense of that term." (1) There I agree with him, only my view of the full sense is larger than that which he adopted. "And that where the right claimed is under a contract between the insured and third parties, it must be confined to the case of a contract relating to the subject-matter of the insurance, which entitled the insurers to have the damages made good." I think it would be better expressed in this way—"which entitles the assured to be put by such third parties into as good a position as if the damage insured against had not happened." If it is put in that sense, it seems to me to be consistent with the proposition which I laid down at the beginning of what I have said, and to cover this case. I will repeat it, "which entitles the assured to be put by such third parties into as good a position as if the damage insured against had not happened." The contract in the present case, as it seems to me, does enable the assured to be put by the third party into as good a position as if the fire had not happened, and that result arises from this contract alone. Therefore, according to the true principles of insurance law, and in order to carry out the fundamental doctrine, namely, that the assured can recover a full indemnity, but shall never recover more, except, perhaps, in the case of the suing and labouring clause under certain circumstances, it is necessary that

(1) 8 Q. B. D. at p. 625.

the plaintiff in this case should succeed. The case of *Darrell* v. *Tibbitts* (1) has cut away every technicality which would prevent a sound decision. The doctrine of subrogation must be carried out to the full extent, and carried out in this case by enabling the plaintiff to recover.

COTTON, L.J. In this case the appellant's company insured a house belonging to the defendants, and before there was any loss by fire the defendants sold the house to certain purchasers. Afterwards there was a fire, and an agreed sum was paid by the insurance office to the defendants in respect of the loss. The appellant apparently seeks to recover the sum which the office paid to the defendants, and if the plaintiff's claim could be shaped only in this form, I think my opinion would be against him. The plaintiff's claim may be treated in substance in another way, namely, the company seek to obtain the benefit either wholly or partly of the amount paid by them out of the purchase-money which the defendants have received since the fire from the purchasers. In my opinion, the plaintiff is right in that contention. I think that the question turns on the consideration of what a policy of insurance against fire is, and on that the right of the plaintiff depends. The policy is really a contract to indemnify the person insured for the loss which he has sustained in consequence of the peril insured against which has happened, and from that it follows, of course, that as it is only a contract of indemnity, it is only to pay that loss which the assured may have sustained by reason of the fire which has occurred. In order to ascertain what that loss is, everything must be taken into account which is received by and comes to the hand of the assured, and which diminishes that loss. It is only the amount of the loss, when it is considered as a contract of indemnity, which is to be paid after taking into account and estimating those benefits or sums of money which the assured may have received in diminution of the loss. If the proposition is stated in that manner, it is clear that the office would be entitled to the benefit of anything received by the assured before the time when the policy is paid, and it is established by the case of *Darrell* v. *Tibbitts* (1)

(1) 5 Q. B. D. 560.

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that the insurance company is entitled to that benefit, whether or not before they pay the money they insist upon a calculation being made of what can be recovered in diminution of the loss by the assured; if they do not insist upon that calculation being made, and if it afterwards turns out that in consequence of something which ought to have been taken into account in estimating the loss, a sum of money or even a benefit, not being a sum of money, is received, then the office, notwithstanding the payment made, is entitled to say that the assured is to hold that for its benefit, and although it was not taken into account in ascertaining the sum which was paid, yet when it has been received it must be brought into account, and if it is not a sum of money, but a benefit that has been received, its value must be estimated in money.

Now Lord Blackburn, in the case of *Burnand* v. *Rodocanachi* (1), states the principle in these words: "The general rule of law (and it is obvious justice) is that where there is a contract of indemnity (it matters not whether it is a marine policy or a policy against fire on land, or any other contract of indemnity,) and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back." In *Darrell* v. *Tibbitts* (2), to which I have already referred, the question which we had to consider was whether the insurance office was entitled to the benefit produced in consequence of a covenant to repair if the building should be damaged by an explosion of gas. In my opinion it was not intended in any way to limit the right of the insurer as an insurer, to cases where the contract in respect of which benefit had been received related to the same loss or damage as that against which the contract of indemnity was created by the policy. That was what was before this Court in that case, and undoubtedly expressions do occur as to a contract relating to the loss or affecting the loss, but the principle was not limited to

(1) 7 App. Cas. 333, at p. 339. (2) 5 Q. B. D. 560.

contracts. The principle which I have enunciated goes further, and if there is a money or any other benefit received which ought to be taken into account in diminishing the loss or in ascertaining what the real loss is against which the contract of indemnity is given, the indemnifier ought to be allowed to take advantage of it in order to calculate what the real loss is, even although the benefit is not a contract or right of suit which arises and has its birth from the accident insured against. Of course the difficulty is to consider what ought to be taken into account in estimating that loss against which the insurer has agreed to indemnify, and we have been pressed in argument with many difficulties. One which possibly was put to us most strongly, was that the contract of sale has nothing to do with destruction by fire, and if any part of the purchase-money is to be taken into account, why is a gift not to be taken into account? That may be said to diminish the loss as well as a contract of sale. The answer is that when a gift is made afterwards in order to diminish the loss, it is bestowed in such terms as to shew an intention to benefit the assured, and to give the insurer the benefit of that would be to divert the gift from its intended object to a different person. That really was what was decided in *Burnand* v. *Rodocanachi*. (1) There the money bestowed, not as a matter of right but as a gift, was intended to benefit the assured beyond the amount which they had got in consequence of any insurance. There is another ground which may possibly exclude gifts. It may be that the right of the insurer to have a sum brought into account in diminution of the loss, against which he has given a contract of indemnity, is confined to that which is a right or other incident belonging to the person insured, as an incident of the property at the time when the loss takes place. This definition would not include a sum subsequently bestowed on the assured by way of gift, for it can in no way be said to have been appertaining to him as owner of the property at the time when the loss took place. But, in the present case, what we have to consider is whether the contract of sale is not an incident of the property belonging to the owners at the time of the loss in such a way, that it ought to be brought into account in estimating the loss, against which the

(1) 7 App. Cas. 333.

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insurer has undertaken to indemnify. What was the position of the parties? The defendants' house was insured, and there was a loss from fire, the damage caused by the fire being estimated by the parties at 330*l.* Ultimately, the property having been already agreed to be sold at a fixed price, the assured received the whole amount of that price. Now they did that in respect of a contract relating to the subject insured, the house, and, to my mind, if they received the whole amount of the price which they previously had fixed as the value of the house, that must of necessity be brought into account when it was received, for the purpose of ascertaining what was the ultimate loss against which they had concluded a contract of indemnity with the insurance office. Here the purchasers have paid the money in full, and as the property was valued between the vendors and the purchasers at 3100*l.*, the vendors got that sum in respect of that which had been burned, but which had not been burned at the time when the contract was entered into. They had fixed that to be the value, and then any money which they get from the purchasers, and which together with 330*l.*, the sum paid by the office, exceeds the value of the property as fixed by them under the contract to sell, must diminish, and in fact entirely extinguishes the loss occasioned to the vendors of the property by the fire. Therefore, though it cannot, to my mind, be said that the insurers are entitled, because the purchase is completed, to get back the money which they have paid, yet they are entitled to take into account the money subsequently received under a contract for the sale of the property existing at the time of the loss, in order to see what the ultimate loss was against which they gave their contract of indemnity. On the principle of *Darrell* v. *Tibbitts* (1), when the benefit afterwards accrued by the completion of the purchase, the insurance company were entitled to demand that the money paid by them should be brought into account. Therefore the conclusion at which I have arrived is, that if the purchase-money has been paid in full, the insurance office will get back that which they have paid, on the ground that the subsequent payment of the price which had been before agreed upon, and the contract for payment of which was existing at the time,

(1) 5 Q. B. D. 560.

must be brought into account by the assured, because it diminishes the loss against which the insurance office merely undertook to indemnify them. In my opinion, therefore, the decision below was erroneous. I think Chitty, J., based it upon this, that in this case there was no right of subrogation, no contract which the office could have insisted upon enforcing for their benefit. I think it immaterial to decide that question, because the vendors have exercised their right to insist upon the completion of the purchase.

BOWEN, L.J. I am of the same opinion.

The answer to the question raised before us appears to me to follow as a deduction from the two propositions, first, that a fire insurance is a contract of indemnity; and secondly, that when there is a contract of indemnity no more can be recovered by the assured than the amount of his loss.

First of all, is a fire insurance a contract of indemnity? It appears to me it is quite as much a contract of indemnity as a marine insurance is: the differences between the two are caused by the diversity of the subject-matters. On a marine policy a ship may be insured which is at a distance and moveable, or goods may be insured on board of vessels which are at a distance, and on a fire policy a house is insured which is fixed to the land; but both are contracts of indemnity. Only those can recover who have an insurable interest, and they can recover only to the extent to which that insurable interest is damaged by the loss. In the course of the argument it has been sought to establish a distinction between a fire policy and a marine policy. It has been urged that a fire policy is not quite a contract of indemnity, and that the assured can get something more than what he has lost. It seems to me that there is no justification in authority, and I can see no foundation in reason, for any suggestion of that kind. What is it that is insured in a fire policy? Not the bricks and the materials used in building the house, but the interest of the assured in the subject-matter of insurance, not the legal interest only, but the beneficial interest; and I do not know any reason why there should be a different definition of what is an insurable interest in fire policies from that which is well known as the established

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definition in marine policies, allowance being made for the differences of the subject-matter. It seems to me that it is an ocular illusion to suppose that under any circumstances more may be obtained by the assured than the amount of the loss. I think this illusion can be detected if it is recollected what are the ordinary business rules according to which insurances are made. It is well known in marine and in fire insurances that a person who has a limited interest may insure nevertheless on the total value of the subject-matter of the insurance, and he may recover the whole value, subject to these two provisions; first of all, the form of his policy must be such as to enable him to recover the total value, because the assured may so limit himself by the way in which he insures as not really to insure the whole value of the subject-matter; and secondly, he must intend to insure the whole value at the time. When the insurance is effected he cannot recover the entire value unless he has intended to insure the entire value. A person with a limited interest may insure either for himself and to cover his own interest only, or he may insure so as to cover not merely his own limited interest, but the interest of all others who are interested in the property. It is a question of fact what is his intention when he obtains the policy. But he can only hold for so much as he has intended to insure. Let us take a few of the cases which are most commonly known in commerce of persons who insure. There are persons who have a limited interest and yet who insure for more than a limited interest, who insure for the total value of the subject-matter. There is the case, which is I suppose the most common, of carriers and wharfingers and commercial agents, who have an interest in the adventure. It is well known what their rights are. Then, to take a case which perhaps illustrates more exactly the argument, let us turn to the case of a mortgagee. If he has the legal ownership, he is entitled to insure for the whole value, but even supposing he is not entitled to the legal ownership he is entitled to insure primâ facie for all. If he intends to cover only his mortgage and is only insuring his own interest, he can only in the event of a loss hold the amount to which he has been damnified. If he has intended to cover other persons beside himself, he can hold the surplus for those whom he has intended

to cover. But one thing he cannot do, that is, having intended only to cover himself and being a person whose interest is only limited, he cannot hold anything beyond the amount of the loss caused to his own particular interest. Suppose for a moment the case of a ship and a mortgagee who has lent 500*l.* on the ship. The ship is worth 10,000*l.* If he insures for 10,000*l.*, meaning only to cover his own interest, and not the interest of anybody besides, can it for a moment be supposed that the mortgagee who insures under those circumstances can hold the 10,000*l.*? That would be an over insurance, and to treat it in any other way would be to make a marine policy not a contract of indemnity, but a wager, a speculation for gain. Suppose, again, there are several mortgagees for small sums, can they all recover and hold (having ex hypothesi insured their separate interests only) the entire value of the ship? It seems to me they cannot. They can recover only what they have lost. That being, as I apprehend, the law about mortgages of ships, is there any real distinction between that and the mortgagee of a house? I can see none. It seems to me that the same principle applies, and here as in many other problems of insurance law, the problem will be solved by going back and resting upon the doctrine of indemnity.

Let us take another instance which has been much pressed upon us in the course of the argument, the case of a tenant for years or a tenant from year to year. We have been asked to hold that a tenant from year to year can always recover the full value of the house from the insurance company, although he has intended to insure only his limited interest in it. There is some justification for that in the language of James, L.J., in *Rayner* v. *Preston*. (1) He says this: "In my view of the case it is perhaps unnecessary to refer to the Act of Parliament as to fire insurance. But that Act seems to me to shew that a policy of insurance on a house was considered by the legislature, as I believe it to be considered by the universal consensus of mankind, to be a policy for the benefit of all persons interested in the property, and it appears to me that a purchaser having an equitable interest under a contract of sale is a person having an interest in the house within the

(1) 18 Ch. D. 1, at p. 15.

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meaning of the Act. I believe that there is no case to be found in which the liability of the insurance office has been limited to the value of the interest of the insured in the house destroyed. If a tenant for life having insured his house has the house destroyed or damaged by fire, I have never heard it suggested that the insurance office could cut down his claim by shewing that he was of extreme old age or suffering from a mortal disease." Now, with the greatest possible respect and reverence for all that is left to us of the judgments of a great judge like James, L.J., I confess I do not follow that. I have no doubt the insurance offices seldom take the trouble to look to the exact interest of the tenant who insures, or perhaps of the landlord who insures, and for the best of all reasons because it is generally intended that the insurance shall be made, not merely to cover the limited interest of the tenant, but also to cover the interest of all concerned. In most cases the covenants as to repair throw liability on one side or the other, and in a large class of leases the liability to repair is by the provisions of the lease thrown upon the tenant. Therefore, in these cases no question ever can arise between the insurance office and the tenant from year to year, or the tenant for years, as to the amount which the insurance office ought to pay. But if a tenant for a year, or a tenant for six months, or a tenant from week to week, insures, meaning only to cover his interest, does anybody really suppose that he could get the whole value of the house? It is true that in most cases the claim of the tenant from year to year, or for years, cannot be answered by handing over to him what may be the marketable value of his property; and the reason is that he insures more than the marketable value of his property, and he loses more than the marketable value of his property; he loses the house in which he is living and the beneficial enjoyment of the house as well as its pecuniary value. That I think is all that was meant by the Vice-Chancellor in *Simpson* v. *Scottish Union Insurance Co.* (1) I will pass on to the case of a life tenant. I will take the case of a life tenant who is a very old man, and whose house is burnt down, but who has intended only to insure his own interest. I am far from saying that he could not under any conceivable circumstances be entitled to have the house

(1) 1 H. & M. 618, at p. 628.

reinstated. A man cannot be compensated simply by paying him for the marketable value of his interest. But it does not follow from that that he gets or can keep more than he has lost. I very much doubt whether, if a life tenant, having intended to insure only his life interest, dies within a week after the loss by fire, the Court would award his executors the whole value of the house. In all these difficult problems I go back with confidence to the broad principle of indemnity. Apply that and an answer to the difficulty will always be found. The present case arises between vendors and vendees. That does not fall within the category of the cases which I have been discussing, where a person with a limited interest intends only to cover his own interest. But can it be any exception to the infallible rule that a man can only be indemnified to the extent of his loss? What is really the interest of the vendors, the assured? Their insurable interest is this—they had insured against fire, and they had then contracted with the purchasers for the sale of the house, and, after the contract, but before the completion, the fire occurred. Their interest therefore is that at law they are the legal owners, but their beneficial interest is that of vendors with a lien for the unpaid purchase-money; they would get ultimately all the purchase-money provided the matter did not go off owing to defective title. Such persons in the first instance can obviously recover from the insurance company the entire amount of the purchase-money. That was decided in the case of *Collingridge* v. *Royal Exchange Assurance Corporation* (1); but can they keep the whole, having lost only half? Surely it would be monstrous to say that they could keep the whole, having lost only half. Suppose for a moment that only 50*l.* remained to be paid of the purchase-money, and that a house had been burnt down to the value of 10,000*l.*, would it be in accordance with any principle of indemnity that persons who were only interested, and could only be interested to the extent of 50*l.*, could recover 10,000*l.*? They would be getting a windfall by the fire, their contract of insurance would not be a contract against loss, it would be a speculation for gain. Then what is the principle which must be applied? It is a corollary of the great law of indemnity, and is to the following effect:—

(1) 3 Q. B. D. 173.

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That a person who wishes to recover for and is paid by the insurers as for a total loss, cannot take with both hands. If he has a means of diminishing the loss, the result of the use of those means belongs to the underwriters. If he does diminish the loss, he must account for the diminution to the underwriters. In *Simpson* v. *Thomson* (1) it is said by Lord Cairns, L.C.: "I know of no foundation for the right of underwriters, except the well known principle of law, that where one person has agreed to indemnify another, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss."

Is there any real distinction here between fire policies and marine policies? It seems to me that the learned judge below, and the American authorities on which he relies, have fallen into the mistake of supposing that the distinction which obtains as to certain incidents of marine policies and fire policies, is derived from a difference of principle, and not from the diversity of the subject matter. In any case the principle of indemnity is the same, and there is no departure from it. I will make plain what I mean by reading the language of Chitty, J. He says, 8 Q. B. D. 618: "An obvious distinction exists between the case of marine insurance and of insurance of buildings annexed to the soil. In the case of marine insurance where there is a constructive total loss, the thing is considered as abandoned to the underwriters, and as vesting the property directly in them. But this doctrine of abandonment cannot be applied to the insurance of buildings annexed to the soil; although the buildings annexed are destroyed, there cannot be a cession of the right to the soil itself." It seems to me, if I may venture to say it of so experienced a judge, that there is an ambiguity in the way in which he is dealing with the doctrine of constructive total loss. The doctrine of abandonment is itself based upon the principle of indemnity. It is well known, historically, that that is so, and in reason it must be so. It is only since marine policies have ceased to be wager policies throughout the world and become contracts of indemnity, that the doctrine of abandonment has become

(1) 3 App. Cas. 279, at p. 284.

universal, and so far from its constituting a difference of principle between marine insurance law and fire insurance law, it is the same principle of indemnity, only worked out differently, because what happens at sea is the loss of a ship, and what happens on land is the loss of a house. It is true that the doctrine of abandonment is inapplicable. But if the buildings annexed to the soil are destroyed, it is not a question of constructive total loss, it is a question of actual total loss. The same ambiguity, I think, is to be found in the language of the American case which Chitty, J., cites at page 624. The learned judge in that case says, "it may be a question whether he" (the Chancellor) "has not relied too much on the cases of marine insurance in which the doctrine of constructive total loss, abandonment, and salvage are fully acknowledged, but which have slight application to insurance against loss by fire." Slight application it is true, but not because the doctrine of indemnity is not to be carried out to its extreme in case of loss by fire, but because the subject matter in the one case is the vessel lost at sea, and in the other the house burned, which is annexed to the soil. Chitty, J., goes on to discuss the case on the basis of what he calls the principle of subrogation. I will add very little to what Brett, L.J., has said about that. It seems to me that a good deal of confusion would be caused, if one were to suppose that insurers are in the position of sureties. A surety is a person who answers for the default of another, and an insurer is a person who guarantees against loss by an event. The default or non-default of another, as between that other and the person who is insured, may diminish or increase the loss; but what the insurer is guaranteeing is not the default of that person, he is guaranteeing that no loss shall happen by the event. And subrogation is itself only the particular application of the principle of indemnity to a special subject matter, and there I think is where the learned judge has gone wrong. He has taken the term "subrogation" and has applied it as if it were a hard and fast line, instead of seeing that it is part of the law of indemnity. If there are means of diminishing the loss, the insurer may pursue them, whether he is asking for contracts to be carried out in the name of the assured, or whether he is

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suing for tort. It is said that the law only gives the underwriters the right to stand in the assured's shoes as to rights which arise out of, or in consequence of, the loss. I venture to think there is absolutely no authority for that proposition. The true test is, can the right to be insisted on be deemed to be one the enforcement of which will diminish the loss? In this case the right whatever it be has been actually enforced, and all that we have to consider is whether the fruit of that right after it is enforced does not belong to the insurers. It is insisted that only those payments are to be taken into consideration which have been made in respect of the loss. I ask why, and where is the authority? If the payment diminishes the loss, to my mind it falls within the application of the law of indemnity. On this point I should like to pause one instant to consider the definition which Brett, L.J., has given. It does seem to me, that taking his language in the widest sense, it substantially expresses what I should wish to express with only one small appendage that I desire to make. I wish to prevent the danger of his definition being supposed to be exhaustive, by saying that if anything else occurs outside it the general law of indemnity must be looked at.

With regard to gifts, all that is to be considered is, has there been a loss, and what is the loss, and has that loss been in substance reduced by anything that has happened? Now I admit that in the vast majority of cases, it is difficult to conceive a voluntary gift which does reduce the loss. I do not think that the question of gift was the root of the decision in *Burnand* v. *Rodocanachi* (1), although it seems to me that it was a very essential matter in considering the case. I think the root of the decision in *Burnand* v. *Rodocanachi* (1) was that the payment which had been made did not reduce the loss, not having been intended to do so. The truth was that the English Government and the American Government agreed that the sums which were to be paid were to be paid not in respect of the loss, but in respect of something else, and therefore the payment could not be a reduction of the loss. Suppose that a man who has insured his house has it damaged by fire, and suppose that his brother offers to give him a sum of money to assist him. The effect on the position of

(1) 7 App. Cas. 333.

the underwriters will depend on the real character of the transaction. Did the brother mean to give the money for the benefit of the insurers as well as for the benefit of the assured? If he did, the insurers, it seems to me, are entitled to the benefit, but if he did not, but only gave it for the benefit of the assured, and not for the benefit of the underwriters, then the gift was not given to reduce the loss, and it falls within *Burnand* v. *Rodocanachi*. (1) If it was given to reduce the loss, and for the benefit of the insurers as well as the assured, the case would fall on the other side of the line, and be within *Randal* v. *Cockran* (2), to which allusion has been made. In the present case the vendors have been paid the whole of their purchase-money. Even if they had not been paid, but had still the purchase-money outstanding, they would have had some beneficial interest in the nature of their vendors' lien. An unpaid vendor's lien is worth something, I suppose. I do not say that it is necessary to decide the point, and I only mention it to make more clear my view of this case, not as laying down the law for future occasions. But if an unpaid vendor's lien is worth something, on what principle could a vendor keep the unpaid vendor's lien and be paid for it by the insurers? In such a case he would be taking with both hands. Now why should not underwriters be entitled at all events to insist on the vendor's lien? As to specific performance I say nothing. I am not familiar, as Cotton, L.J., is, with that branch of the law, and there may be some special reasons why the insurers should not be able to insist upon specific performance; but why should not they insist upon the unpaid vendor's lien? The vendor, if he did not exercise it for their benefit, would be trying to make the contract between himself and the insurers more than a contract of indemnity. Chitty, J., seems to think that in this instance it is necessary to recollect that the contract of sale was not a contract, either directly or indirectly, for the preservation of the buildings insured; that the contract of insurance was a collateral contract wholly distinct from, and unaffected by, the contract of sale. What does it matter? The beneficial interest of the vendors in the house depends on the contract being fulfilled or not, and the fulfilment of the contract lessens

(1) 7 App. Cas. 333. (2) 1 Ves. Sen. 98.

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the loss, its non-fulfilment affects it. Chitty, J., indeed, says further that "the attempt now made is to convert the insurance against loss by fire into an insurance of the solvency of the purchaser." (1) That may be answered in the same way. It is not that the solvency of the purchaser is guaranteed, but that the vendors are guaranteed against the loss which is diminished or increased according as the purchaser turns out to be solvent or not. The solvency of the purchaser affects the loss,—that is the only way in which it touches the insurance—it is not because the insurance is directly an insurance of his solvency. Finally (and this is the last observation that I wish to make upon the judgment of Chitty, J.), he puts the case of a landlord insuring, and the tenant under no obligation to repair. He takes a case, "where under an informal agreement evidently drawn by the parties themselves, the large rent of 700*l.* was reserved, and the tenant, notwithstanding the fire, was bound to pay the rent." He says, "Assume that the building in such a case was ruinous, and would last the length of the term only. Could the insurers recover a proportionate part of each payment of rent as it was made, or could they wait until the end of the term, and then say in effect, 'You have been paid for the whole value of the building, and therefore we can recover against you?'" That seems to me at first sight to look as if it were a very difficult point, but I think this difficulty diminishes, if it does not vanish, as soon as it is considered what are the conditions of the hypothesis. Is the learned judge supposing that the landlord, who is a person with a limited interest, did intend to insure all other interests besides his own? The landlord can do so if he so intended; the question is, has he done so? If the landlord intended to insure all other interests besides his own, the difficulty dissipates itself into thin air. If he did not, it would be a very odd case, and perhaps one might ride safely at anchor by saying that one would wait till it arose. But I am not desirous of being over cautious, because I am satisfied to rest on the broad principle of indemnity, and I say, "Apply the broad principle of indemnity, and you have the answer." The vendor cannot recover for greater loss than he suffers, and if he has only a limited interest in the

(1) 8 Q. B. D. 621.

subject-matter, and only intends to insure that interest, I know of no means in law or equity by which he is entitled to obtain anything else out of the insurance office except what is measured by the measure of his loss. As to the form of action, I need add nothing to what has fallen already from the other members of the Court. I am so much in accord with their views that I should not have added a judgment as long as mine has been if it were not for the very great importance, to my mind, of keeping clear in these insurance cases what is really the basis and foundation of all insurance law.

Judgment reversed.

Solicitors for plaintiff: *Gregory, Rowcliffes, & Co, for Laces, Bird, Newton, & Richardson, Liverpool.*

Solicitors for defendants: *Torr & Co., for Anthony & Imlach, Liverpool.*

J. E. H.

[IN THE COURT OF APPEAL.]

March 19.

CHAMBERLAIN *v.* BOYD.

Defamation—Slander—Remoteness of Damage—Damage not natural and probable Consequence of Words spoken.

Claim, that the plaintiff was a candidate for membership of the R. Club, but upon a ballot of the members was not elected; that a meeting of the members was called to consider an alteration of the rules regarding the election of members; that the defendant falsely and maliciously spoke and published of the plaintiff as follows: "The conduct of the" plaintiff "was so bad at a club in M. that a round robin was signed urging the committee to expel" him; "as however" he was "there only for a short time, the committee did not proceed further;" whereby the defendant induced a majority of the members of the club to retain the regulations under which the plaintiff had been rejected, and thereby prevented the plaintiff from again seeking to be elected to the club:—

Held, upon demurrer, that the claim disclosed no cause of action; for the words complained of, not being actionable in themselves, must be supported by special damage in order to enable the plaintiff to sue; and the damage alleged was not pecuniary or capable of being estimated in money, and was not the natural and probable consequence of the defendant's words.

CLAIM. 1. The plaintiff together with his brother was a candidate for membership of the Reform Club. The defendant was a member of the said club.

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2. Upon a ballot of the members of the said club the plaintiff and his brother were not elected to membership.

3. Subsequently to the said ballot, a meeting of the members of the club was called to consider a proposed alteration of the rules regulating the election of members, and the defendant took an active and personal interest in the matter.

4. With a view to retain the regulations as they then existed, and to secure the exclusion of the plaintiff from membership of the said club, the defendant falsely and maliciously spoke and published of the plaintiff, together with his said brother, the words following, that is to say: "The conduct of the Messrs. Chamberlain" (meaning the plaintiff and his said brother), "was so bad at a club in Melbourne, that a round robin was signed urging the committee to expel them. As however they were there only for a short time, the committee did not proceed further:" (meaning thereby that the plaintiff had been guilty of conduct, which justified his expulsion from a club in Melbourne, and which unfitted him from membership of the Reform or any other similar club).

7. By reason of the said defamatory statements the defendant induced or contributed to inducing a majority of the members of the club to retain the regulations under which the plaintiff had been rejected, and thereby prevented the plaintiff from again seeking to be elected to the said club. The plaintiff thus lost the advantage, which he would have derived from again becoming a candidate with the chance of being elected. And the plaintiff suffered in his reputation and credit.

The defendant demurred.

FIELD, J., overruled the demurrer.

The defendant appealed.

March 16, 19. *C. Russell, Q.C.* (*Houghton*, with him), for the defendant. It may be conceded by the defendant that if the plaintiff had been rejected at an election for the Reform Club owing to the words complained of, an action would lie; but the claim in its present shape is bad on three grounds; first, there is no sufficient allegation of special damage; secondly, the special

damage alleged is unconnected with the slander; thirdly, the special damage is too remote.

In the present case the words are not actionable in themselves, and they are not alleged to have been spoken with reference to the plaintiff's conduct in a trade or profession; and whatever a man's motives or objects may be, his words do not on that account become more actionable, except upon instances of privilege where the existence of express malice may become a material question. The claim must be construed most strongly against the party who pleads it, that is, the plaintiff.

[BRETT, L.J. That argument seems hardly correct; a claim is like a declaration under the former system of pleading, and a declaration was not construed with the same strictness as a plea.]

The seventh paragraph merely alleges that the members of the club were induced to retain the regulations under which the plaintiff was rejected; this is not a matter which immediately affects him.

[BOWEN, L.J. Perhaps that paragraph may be said to mean that the plaintiff was deprived of the advantage of obtaining a more favourable tribunal.

BRETT, L.J. Suppose a slander upon a candidate for a seat in Parliament by words not actionable in themselves, whereby he lost a good chance of being successful at the election.]

The candidate could not maintain an action merely for losing the chance of being elected. Further, the damage alleged is too remote; it does not appear that the plaintiff intended to again become a candidate; he might have been elected without any change of the rules, if he had been proposed for membership a second time. *Vicars* v. *Wilcocks* (1) shews that in order to support an action, the words complained of must be the sole cause of the injury sustained; but the seventh paragraph merely states that the defamatory statements "induced or contributed to inducing" the members of the club to retain the regulations; and this language shews that the defendant's act was only one of the causes of the injury alleged. The substance of the plaintiff's complaint is that if the defendant had not spoken the words, the

(1) 2 Smith L. C. 553 (8th ed.).

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plaintiff might have become a candidate and might have been elected. The damage alleged is not such as the law will take notice of: *Lynch* v. *Knight* (1); *Roberts* v. *Roberts* (2).

Sir H. James, A.G., and *Crump*, for the plaintiff. To dispose of an action for defamation upon demurrer is a very unsatisfactory mode of determining it: *Leyman* v. *Latimer* (3); it is a much more convenient course to try the case. A claim is like a declaration; and in a declaration it was sufficient to state the facts in general terms; although a different rule of construction applied to a plea. It may be that the words complained of in the present action would be insufficient to support an action without special damage; but any temporal disadvantage is sufficient; it need not be a pecuniary loss; the judges of the Court of Common Pleas appear to have been of that opinion: *Haddan* v. *Lott.* (4)

[LORD COLERIDGE, C.J. In *Allsop* v. *Allsop* (5) it was held that an action would not lie for slander imputing incontinency to a married woman, the declaration merely alleging that by reason thereof she became ill and unable to attend to her necessary affairs and business, and that her husband was put to expense in endeavouring to cure her. That case must be taken to have been rightly decided since *Lynch* v. *Knight.* (1)]

But in *Davies* v. *Solomon* (6) it was held that the loss of hospitality and the exclusion from the society of friends were sufficient to give a cause of action. If the defamatory words lessened the plaintiff's chance of being elected, they are actionable; and the liability is the same, if they prevented the steps necessary to secure the plaintiff's election from being taken. Suppose that a man is falsely accused of bearing a bad character whereby a minister of the Crown is prevented from nominating him as a candidate for an official situation to be gained by competition; will he not be entitled to an action?

[BOWEN, L.J. In that case the person defamed has all chance

(1) 9 H. L. C. 577.
(2) 5 B. & S. 384.
(3) 3 Ex. Div. 352, at pp. 356, 357, per Brett, L.J.
(4) 15 C. B. 411; 24 L. J. (C.P.) 49.
(5) 5 H. & N. 534.
(6) Law Rep. 7 Q. B. 112.

taken from him of gaining the situation; here the complaint is that owing to the defendant's words the plaintiff has not so good a chance of being elected to the Reform Club.]

Upon a claim everything must be assumed in favour of the plaintiff. The plaintiff is willing to amend the claim by striking out in the seventh paragraph the words "contributed to inducing." If the plaintiff was prevented from offering himself a second time as a candidate for membership, he is entitled to maintain an action.

[LORD COLERIDGE, C.J. Surely that argument is not sustainable if the decision in *Ashley* v. *Harrison* (1) is right; the declaration there stated that the defendant had published a libel on Madame Mara, in consequence of which she refused to sing (as she had engaged to do) at an oratorio from an apprehension of being hissed; and Lord Kenyon, C.J., nonsuited the plaintiff.]

C. Russell, Q.C., in reply. It may be assumed upon this claim that the defendant's words prevented a change of regulations at the Reform Club, which would have given to the plaintiff a better chance of being elected, and that owing to the retention of the existing regulations, the plaintiff was placed in a worse position as to the likelihood of becoming a member; nevertheless he has not sustained a pecuniary or temporal loss; and it is a cardinal proposition for the plaintiff to establish that he has suffered a disadvantage of that nature. No amendment of any kind will shew a good cause of action.

LORD COLERIDGE, C.J. Several points have been raised during the argument before us, some of them merely verbal, but two are points of substance. If I could see any use in commenting upon the special phrases of the claim, I should say that some of the criticisms passed upon them are well-founded and others ill-founded; and if an amendment could be made such as has been suggested, it might be worth while to consider which of these criticisms are well-founded. But as upon two grounds the demurrer must be supported in point of substance, verbal criticism is useless.

First, no damage is alleged in respect of which the law allows

(1) 1 Esp. 48; 1 Peake, 194.

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an action to be brought. To take the question most favourably for the plaintiff, the statement of claim merely alleges that the defendant falsely and maliciously, that is, with an intention hostile to the plaintiff, spoke and published words whereby a change in the mode of the election of candidates at the Reform Club was prevented, and the members of that club were induced to retain a mode of election which gave less chance of success to the plaintiff if his name should be put up at the club again. I am clearly of opinion that it would be dangerous to hold that these averments give a ground of action: the damage alleged is unsubstantial and shadowy, and is in truth incapable of being estimated in money; and where words spoken, as in the present case, are not actionable in themselves, they can become actionable only when they have been followed by pecuniary or temporal damage. The case is new and is unsupported by the authority of any previous decision, and the argument for the plaintiff is entirely opposed to the principles upon which actions of slander have been determined. I am not inclined to extend the limits within which the law allows actions for defamation to be brought. Upon this ground alone, I think that the demurrer ought to be upheld.

But there is a second and broader ground, upon which the defendant must succeed; and that is that the alleged damage is not the natural and probable result of the words complained of. They may be derogatory of the plaintiff's character; but it is incredible that even if these words were believed to be true by a majority of the members, they should be so influenced by them as to refuse to change the mode of election. To my mind it is irrational to suppose that a result of that kind could follow from the use of the words complained of. Clubs may be influenced by a variety of motives, political clubs by political considerations, social clubs by social considerations; but assuredly a club would not be influenced as to its mode of election by considerations favourable or unfavourable to the character of one or two persons who might hereafter become candidates for election. The present case comes distinctly within the authority of *Lynch* v. *Knight* (1), of which the principle applies to the words complained of. Upon this second ground also I think that the demurrer must prevail.

(1) 9 H. L. C. 577.

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BRETT, L.J. I have no sympathy with the demurrer. The words are derogatory to the plaintiff; and either the defendant ought simply to have denied that he uttered them, or he ought simply to have apologised and retracted, or he ought simply to have justified them; the defendant ought to have adopted one of these three courses without demurring. A demurrer is a very different mode of defeating the plaintiff; the defendant in effect says that although he has used the words in the meaning complained of, he will not retract and he will not allow the plaintiff to prove that the imputation is untrue. It is true that if the demurrer had not been pleaded, the plaintiff might not have been able to compel the defendant to justify his words; for in my opinion it would be the duty of the judge at the trial to direct a nonsuit or to enter judgment for the defendant at the close of the plaintiff's case. Nevertheless, as matters stand, the demurrer ought to be almost as satisfactory to the plaintiff as a retractation, and if I thought that any amendment would make the statement of claim good, I would allow it to be made and would endeavour to sustain the action. But I think that no amendment would give a valid cause of action. Suppose it to be proved that the defendant had uttered the words complained of with the object and effect alleged and had persuaded a majority of the members of the club to refuse to alter their mode of election, and that if the mode of election had been changed the plaintiff might have been elected, and that the refusal to alter the mode of election prevented the plaintiff from being elected; nevertheless, the action would not be maintainable. With regard to the plaintiff being prevented from again becoming a candidate with the chance of being elected, damage of this kind is far too shadowy to constitute a cause of action.

But a further reason exists why judgment should be given for the defendant. It has been said that the words complained of have produced an injury to the plaintiff; but I think it sufficiently clear that in law these words were not the cause of that injury—it was not the direct and probable result of the words. I think that our decision must be governed by the opinions of the Law Lords in *Lynch* v. *Knight* (1). That was an action for slander

(1) 9 H. L. C. 577.

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commenced in the Court of Queen's Bench in Ireland and brought before the House of Lords upon error. The defamatory words were not actionable per se. Lord Campbell there said (1): "I am of opinion that in the present case the action is not maintainable, because, looking to the frame of the declaration, the loss or special damage relied upon is not the natural and probable consequence of the injury complained of, namely, the speaking of the slanderous words." Lord Cranworth says (2): "The special damage, in order to afford a foundation for such an action, must appear to be the natural, I do not say the necessary, consequence of the words spoken." Lord Wensleydale says (3): "I am much influenced by the able reasoning of Mr. Justice Christian. I strongly incline to agree with him, that to make the words actionable, by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking the words, not what would reasonably follow, or we might think ought to follow." These passages lay down the rule which must govern us.

In the notes to *Vicars* v. *Wilcocks* (4) it is said that "the words for which an action is maintainable must have, in common sense and reason, some connection with the damage said to have ensued from them; and it is not enough that the unwarrantable caprice of some person has caused a damage to result from them, which the speaker had no reason to apprehend." This language is perhaps not quite accurate; but it points out the principle which must be followed. In the present case the refusal to alter the rules was not the natural and probable result of the words complained of. It is almost absurd to suppose that because the members of a club in London believed the plaintiff to have misconducted himself at Melbourne, they refused to alter their rules as to the mode of election. Such a result would be absurd and fantastic. And even if the mode of election had been changed, it by no means follows that the plaintiff would have been elected. On the ground also that the injury complained of is not the natural and probable

(1) 9 H. L. C. at p. 591.
(2) 9 H. L. C. at p. 595.
(3) 9 H. L. C. at p. 600.
(4) 2 Smith's L. C. 563 (8th ed.)

result of the words spoken by the defendant, I am of opinion that this demurrer must be allowed.

BOWEN, L.J. I am of the same opinion. I decide the case not upon any ingenious criticism of the words used; at this stage of our legal history we ought not to weigh too nicely the language of pleaders. By modern legislation, and especially by the Judicature Acts, the Courts have, very fortunately, been invested with large powers of amendment, and by brushing away all legal difficulties the judges may find out what the pleaders really meant, and make all amendments necessary to arrive at the real meaning of the parties. But calling in aid all powers of amendment, and putting upon the statement of claim the most favourable construction to the plaintiff, it appears to me that no legal liability can be shewn against the defendant; and at the trial the judge would be bound to nonsuit upon the opening of the plaintiff's counsel. It appears from the averments in the statement of claim that the plaintiff had been a candidate for membership of the Reform Club, and that the words of the defendant prevented the members from adopting regulations which would have given the plaintiff a better chance of success. Upon demurrer these averments must be taken to be true; nevertheless I am of opinion that there is no legal damage such as is necessary to sustain the action. In law, words spoken are different from words written, and special damage is necessary to support an action for slander not imputing crime, misconduct in a profession or a trade, or some kinds of disease; and in the present case no loss of any temporal advantage is alleged. I do not say that if the defendant by speaking the words complained of had actually prevented the election of the plaintiff, the latter might not have had a cause of action. Possibly the membership of a club may be a matter of temporal advantage, and the deprivation of it may be an injury or damage of which the law will take cognisance. But it is not alleged that the defendant's words prevented the election of the plaintiff, and that is the fatal blot in the plaintiff's case. It is not properly alleged even that the defendant's words prevented a change in the mode of election, but only that they contributed to do so; an averment which would be satisfied if one of a majority of a hundred was influenced to give his vote by the slander. Ambiguity

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has been introduced into the language of the claim, and the plaintiff's pleader has taken refuge on this point in a certain cloudiness of expression. No doubt it was felt that a difficulty might be encountered in proving more than this much at the trial. But suppose a clear allegation that the refusal to alter the rules was caused by the defendant's words: nevertheless the case for the plaintiff fails. Even if the vote of the majority was substantially influenced by the defendant's words, it does not follow that under a new electoral body or under any altered rules of procedure the plaintiff would have been elected. It might have been different if it had been stated that by reason of the defendant's words the plaintiff had been deprived either of the opportunity of standing again or of all chance of being elected. But that is not alleged in the claim: all that is stated is that the plaintiff was prevented from again *seeking* to be elected, that is, that the determination of the club to retain the regulations under which the plaintiff had been rejected, made him think it not worth his while to stand again for election. The defendant's words did not deprive the plaintiff of all chance of being elected; they only deprived him of "a" chance. And "a" chance is a word expressive only of the measure of the uncertainty of a man's own mind. Putting the case in the strongest manner for the plaintiff it only comes to this—that the refusal to alter the regulations kept him in a position in which an election might or might not result in his being chosen a member. But that appears to me to leave the damage too remote, and to place it beyond the line which the law has wisely drawn. The risk of temporal loss is not the same as temporal loss: the risk of suffering injury is not the same as to suffer injury. If it were otherwise, the limitation which the law imposes on liability to actions for words spoken would be entirely done away with, because the party defamed could always urge that he had lost the chance of an advantage or had run the risk of an injury. But the "chance" of an advantage is not the same as the advantage, and the risk of an injury is not the same as the injury. The law has said that in order to support an action for words spoken not imputing crime, misconduct in a trade or profession, or disease, there must be a loss of some temporal benefit, and the plaintiff has failed to shew any.

I also think that the damage alleged is far too remote, and also that it is not the natural and probable consequence of the words spoken. As to this part of the case I have nothing to add to what has fallen from Lord Coleridge, C.J., and Brett, L.J., and I concur in their judgments.

Judgment for the defendant.

Solicitors for plaintiff: *Lewis & Lewis.*

Solicitors for defendant: *Johnsons, Upton, Budd, & Atkey.*

J. E. H.

THE QUEEN *v.* THE JUSTICES OF THE WEST RIDING OF YORKSHIRE.

June 19.

Licensing Acts—Conviction of licensed Person—Forfeiture of Licence—Application by Owner of Premises to Special Sessions for Licence, Refusal of—Right of Appeal to Quarter Sessions—9 *Geo.* 4, *c.* 61, *ss.* 4, 14; 35 *&* 36 *Vict. c.* 94, *s.* 9; 37 *&* 38 *Vict. c.* 49, *s.* 15.

The appeal clauses of 9 Geo. 4, c. 61 (the Intoxicating Liquors Licensing Act, 1828), are incorporated in 37 & 38 Vict. c. 49 (the Licensing Act, 1874), s. 15, and therefore when the licence of a public-house keeper is forfeited by conviction under 35 & 36 Vict. c. 94, s. 9, and the owner of the premises duly applies under 37 & 38 Vict. c. 49, s. 15, to special sessions for a licence and it is refused, he has a right of appeal to quarter sessions.

RULE for a mandamus to justices at quarter sessions to enter continuances and hear an appeal.

On the 30th of November, 1882, the tenant of a public-house was convicted under 35 & 36 Vict. c. 94, s. 9, of making an internal communication between his licensed premises and unlicensed premises, and forfeited his licence. The owner of the premises gave fourteen days' notice under 35 & 36 Vict. c. 94, s. 40, of his intention to apply, and on the 14th of December, 1882, did apply to justices at petty sessions for a temporary authority under 37 & 38 Vict. c. 49, s. 15, to carry on the business. The application was adjourned to special sessions, where on the 11th of January a further application was made under section 15 for a licence, which was refused. The owner appealed to quarter sessions, but they refused to hear the appeal on the ground of want of jurisdiction.

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E. N. F. Fenwick, for the respondents, shewed cause. By 37 & 38 Vict. c. 49, s. 15, the owner was, under the circumstances in this case, entitled to make an application to a Court of summary jurisdiction for authority to carry on the same business on the same premises until the next special sessions, and a further application to such next special sessions for a grant of a licence, "and for this purpose the provisions contained in the Intoxicating Liquor Licensing Act, 1828, with respect to the grant of a temporary authority and to the grant of licences at special sessions shall apply as if the person convicted had been rendered incapable of keeping an inn, and the person applying for such grant was his assignee."

By that Act of 1828, 9 Geo. 4, c. 61, s. 4, special sessions are to be appointed at which it shall be lawful for the justices "in the cases and in the manner and for the time" thereinafter directed, to license "such persons intending to keep inns theretofore kept by other persons being about to remove from such inns"; and by s. 14 if any person duly licensed under this Act shall . . . die, or shall be by sickness or other infirmity rendered incapable of keeping an inn, or shall become bankrupt, or . . . shall remove from or yield up possession of the house, &c., it shall be lawful for the justices at a special session holden under the authority of this Act to grant to . . . the assigns of such person becoming incapable of keeping an inn, a licence until the next general annual licensing meeting. Then by s. 27, "any person who shall think himself aggrieved by any act of any justice done in or concerning the execution of this Act may appeal" to quarter sessions. 5 & 6 Vict. c. 44 was passed to save assignees from waiting until special sessions, and to enable them to go to petty sessions for a transfer, and that Act is by 35 & 36 Vict. c. 94, s. 74, included in the term "Intoxicating Liquors Licensing Act, 1828," being one of "the Acts amending the same."

35 & 36 Vict. c. 94, sched. 2, repeals s. 27, and ss. 28 and 29 of the Act of 1828, "except in so far as" they "relate to the renewal of licences or to the transfer of licences under sections 4 and 14 of the same Act."

This case is not one of those referred to and specified in sections 4 and 14 of the Act of 1828. It is an application under 37 & 38

Vict. c. 49, s. 15, and that section 15 only incorporates the provisions of the Act of 1828 for the purpose of applications at special or petty sessions, but does not incorporate the appeal clause, s. 27 of the Act of 1828.

The final clause of 37 & 38 Vict. c. 49, s. 15, does not give a right of appeal.

"An appeal does not lie unless expressly given by statute": per Abbott, C.J.; *Rex* v. *Hanson* (1); even although very general words are used: *Rex* v. *Justices of Surrey* (2), and an appeal cannot be given by implication only: *Reg.* v. *Stock.* (3)

Wightman Wood, for the appellant. An appeal in this case is given expressly and not by mere implication. 35 & 36 Vict. c. 94 (Act of 1872) and 37 & 38 Vict. c. 49 (Act of 1874) are one Act for the purposes of interpretation, and s. 15 of the latter declares that the provisions in the Intoxicating Liquor Licensing Act, 1828, which by s. 74 of the Act of 1872 includes all the Licensing Acts, with respect to the grant of a temporary authority and to the grant of licences at special sessions shall apply "as if the person convicted had been rendered incapable of keeping an inn, and the person applying for such grant was his assignee." The right of appeal under 9 Geo. 4, c. 61, was extensive, and has never been interfered with except by the 2nd schedule of the Act of 1872, and these ss. 27, 28, and 29 of 9 Geo. 4, c. 61, are so far as they relate to the renewal of licences or to the transfer of licences, preserved. This case was an application for a transfer under s. 14. If the tenant had been sick instead of convicted, and the owner of the premises as his assignee had applied, beyond doubt an appeal could have been brought.

A. L. SMITH, J. I am of opinion that this rule nisi for a mandamus to enter continuances and hear the appeal should be made absolute. The question is, whether the appeal clauses of 9 Geo. 4, c. 61, are or are not incorporated in s. 15 of the Licensing Act, 1874. The Legislature was dealing with the case where a tenant is convicted of making internal communications between his licensed and unlicensed premises, in which case the

(1) 4 B. & Ald. 519, at p. 521.
(2) 2 T. R. 504.
(3) 8 Ad. & E. 405.

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licence would be forfeited, and the landlord, by the delinquency of the tenant and no fault of his own, would lose the licence, and therefore ought to be able to apply for and obtain a temporary licence; and s. 15 enacts that where any licensed person is so convicted, and in consequence either becomes personally disqualified, or has his licence forfeited, an application may be made by the owner of the premises for a temporary authority and a licence; "and for this purpose the provisions"—which must mean all the provisions—"contained in the Intoxicating Liquor Licensing Act, 1828"—that is, the code of licensing laws from that date onwards—"with respect to the grant of a temporary authority, and to the grant of licences at special sessions shall apply as if the person convicted had been rendered incapable of keeping an inn, and the person applying for such grant was his assignee."

I think that the legislature meant by s. 15 to put the landlord in precisely the same position where his tenant has been convicted as if he, the landlord, had a tenant incapable of keeping an inn, and was the assignee of such tenant. So we must go back to s. 14 of 9 Geo. 4, c. 61, enacting that where any person shall be rendered incapable of keeping an inn, and his assignee comes forward, he shall step into the position of that tenant. If the assignee did not get justice at licensing sessions, it is clear that he would have an appeal under s. 27 of 9 Geo. 4, c. 61. I think that the landlord is put in exactly the same position as the assignee of a tenant incapable of keeping an inn. In my opinion the justices were wrong, and the appeal should be heard.

WATKIN WILLIAMS, J. I am entirely of the same opinion. It seems to me that the right of appeal is expressly given by s. 15 of the Act of 1874; in other words, that by involving in that section the parts of the Act of 1828 referred to, the legislature has expressly reserved the right of appeal.

Rule absolute.

Solicitors for appellant: *W. Harrop.*
Solicitors for respondents: *Badham & Williams.*

J. R.

THWAITES *v.* WILDING AND HANCOCK.

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July 6.

Landlord and Tenant—Illegal Distress—Withdrawal—Lodgers' Goods Protection Act, 1871 (34 & 35 *Vict. c.* 79)—*Sufficiency of Declaration and Inventory under s.* 1.

On the 1st of September, 1882, W. distrained for 8*l.* rent due to him from T. who held three rooms under him at the weekly rent of 10*s.* T. had underlet one of the rooms at the weekly rent of 3*s.* 6*d.* (none of which was in arrear) to the plaintiff, who claimed the goods seized as being her sole property, and on the 5th gave W. the proper notice with a written declaration and inventory in the form required by s. 1 of the Lodgers Goods Protection Act, 1871 (34 & 35 Vict. c. 79). W., in consequence of this claim and of his immediate tenant T. paying him 1*l.* on account of the rent, and engaging to pay the remaining 7*l.* by weekly instalments of 10*s.*, withdrew the distress.

On the 21st of September two more weeks' rent having become due from T., and he having failed to pay any of the instalments as agreed, W. again distrained the same goods for 8*l.*, being 7*l.* of the rent for which the first distress was put in and 1*l.* for the two weeks' subsequently accruing rent. No fresh declaration and inventory having been served upon him by the plaintiff, W. caused the goods to be carried away and sold. At the sale they realized 5*l.* 11*s.*

In an action at the suit of the lodger for wrongfully breaking and entering the premises and converting and selling her goods:—

Held, first, that as between the defendant and his immediate tenant, the distress on the 21st of September was not wrongful or illegal, but at the most *excessive*, and therefore not the subject of an action in the absence of an allegation and proof of special damage; secondly, that the declaration and inventory served on the 5th of September were not applicable to the distress levied on the 21st, and consequently that the plaintiff could not avail herself of the benefit of the Lodgers' Goods Protection Act, 1871.

Affirmed on appeal (12 QBD 42 C. A.

ACTION for wrongfully breaking and entering rooms of the plaintiff and distraining her goods, she being a lodger.

The cause was tried before Mathew, J., on the 7th of June, 1883. The facts were as follows:—The defendant Wilding was the lessee of a house in the Kingsland Road. In March, 1881, he let three of the rooms therein to one Stephen Thwaites at a rent of 10*s.* per week. On the 1st of September, 1882, the sum of 8*l.* being due from Stephen Thwaites for rent, Wilding employed the other defendant, Hancock, to distrain for that sum and 3*s.* costs of the levy. The plaintiff Jane Thwaites, who occupied one of the rooms as tenant to her brother Stephen Thwaites at 3*s.* 6*d.* per week (which both swore had been regularly paid), claimed to be the

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owner of the goods seized, and on the 5th served the defendants with a declaration under s. 1 of the Lodgers' Goods Protection Act, 34 & 35 Vict. c. 79 (1), which was good in all respects. On the 6th the landlord,—having agreed with Stephen Thwaites, his immediate tenant, to take 1*l.* and a promise to pay the residue of the rent by instalments of 10*s.* per week,—withdrew from possession, and on the 21st he by the same broker again seized the same goods for 8*l.* arrears of rent and 3*s.* for the levy (the instalments of 10*s.* per week not having been paid, and an additional sum of 1*l.* for two weeks' subsequently accruing rent having then

(1) That section enacts that, "if any superior landlord shall levy or authorize to be levied a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing made by such lodger, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the property or in the lawful possession of such lodger; and also setting forth whether any and what rent is due, and for what period, from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, or to the bailiff or other person employed by him as aforesaid, the rent, if any, so due as last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord; and to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods, and chattels referred to in the declaration; and, if any lodger shall make or subscribe such declaration and inventory knowing the same or either of them to be untrue in any material particular, he shall be deemed guilty of a misdemeanor."

And s. 2 enacts that, "if any superior landlord, or any bailiff or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person, the rent (if any) which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person shall be deemed guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into."

become due to him from Stephen Thwaites), and took away and sold the plaintiff's goods, having first offered them to her at the condemnation price, 5*l.* 4*s.* At the sale the goods realized 5*l.* 11*s.* It was sworn that the plaintiff had duly paid all rent payable by her to Stephen Thwaites down to the date of the second seizure.

It was contended for the plaintiff that the distress on the 21st of September was an illegal distress at all events so far as regarded the 7*l.* balance of the rent for which the first distress was levied; and that the declaration served on the 5th was a good declaration under the Act as applicable to the second distress.

For the defendant it was submitted that the distress on the 21st of September, being levied for subsequently accruing rent in addition to that originally distrained for, was legal though possibly excessive, and that the statutory declaration of the 5th of September could not enure as a declaration under the distress levied on the 21st.

The learned judge ruled that, as the second distress had been put in for an amount for which the first distress had been levied, it was illegal within the Act, if the jury thought that the plaintiff was a lodger and that the defendant had withdrawn after the notice of that fact had been given to him; and that, notwithstanding further rent had accrued, the second distress was not lawful, inasmuch as it was levied for the amount of the first, plus the 20*s.* which had accrued due afterwards.

An order nisi for a new trial on the ground of misdirection having been obtained,

M'Clymont (*Shearman* with him,) shewed cause. The entry under the second warrant was clearly illegal. Where a landlord has voluntarily abandoned a distress, he cannot distrain again: *Dawson* v. *Cropp* (1)

So far as regards the 7*l.* at all events, the abandonment was voluntary. As regards the lodger's goods, the withdrawal might have been involuntary; but not so as regards the goods of the immediate tenant.

[DENMAN, J. Can this be said to have been more than an excessive distress?]

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The provisions of the Lodgers' Goods Protection Act are very precise. By s. 1, if the lodger's goods are distrained, he may protect them by a declaration that they are his, and that he owes no rent; and by s. 2, if the landlord distrains or proceeds with the distress after being served with such declaration and inventory, he is to be deemed guilty of an illegal distress.

[MANISTY, J. Suppose the second distress had been for the 1*l.* additional, could you have urged that a new declaration and inventory were not necessary?]

The statute will be of small avail to those whom it was designed to protect, if a second notice is held to be necessary in circumstances like these.

Henry Kisch, in support of the order. Reading the two sections of the Act together, they necessarily refer to a declaration and inventory after the particular distress which is complained of. Having a legal right to distrain on the 21st of September for the rent accruing since the first distress, the fact of its covering also the balance of the former rent could not, as the learned judge in his direction to the jury assumes, be an illegal distress. The Act of 1871 being in derogation of the landlord's right, until compliance with the condition imposed thereby the right remains. If, then, the right of distress existed, the entry on the 21st of September was not a trespass, and the jury were clearly misdirected.

Cur. adv. vult.

July 6. DENMAN, J. This action is brought upon a somewhat peculiar statement of claim. [The learned Judge read the pleadings.] The facts were these:—On the 1st of September, 1882, the defendant Wilding, who was the superior landlord of premises 143, Kingsland Road, distrained all the goods upon the premises for 8*l.* rent then due to him from one Stephen Thwaites for three rooms which the latter held at 10*s.* per week. On the same day the plaintiff, to whom Stephen Thwaites had underlet one of the rooms for 3*s.* 6*d.* per week, claimed to be entitled to the goods so seized, and on the 5th served the defendant with a proper declaration or notice under s. 1 of the Lodgers' Goods Protection Act, 1871, and an inventory of the goods which she claimed, and

stating that no rent was due from her to Stephen Thwaites. This distress was thereupon withdrawn, an arrangement having been come to between Wilding and his immediate tenant that the latter should pay 1*l.* down and 10*s.* per week in satisfaction of 7*l.* 3*s.*, the balance of the rent and 3*s.* for the levy. The tenant Stephen Thwaites having failed to make the weekly payments, and a further sum of 1*l.* having accrued due for two weeks' subsequent rent, Wilding on the 21st of September again distrained on the same goods for 8*l.* and 3*s.* costs of levy, being the 7*l.* left unpaid on the first distress and 1*l.* the subsequently accruing rent; and, no fresh claim having been preferred by the lodger, the goods were duly appraised, and sold for 5*l.* 11*s.*

Under these circumstances, the important question is whether the seizure on the 21st of September can be looked upon as a trespass by reason of the declaration and inventory delivered on the 5th. Looking at the requirements of the Act, I have come to the conclusion that that declaration was referable to the first distress only, and not to the second. The object of the Act was to enable the landlord to get from the lodger the rent which might then be due from him to his immediate landlord: and the declaration and notice must, to give the lodger the protection intended, be given at the time of and be applicable to the distress which is complained of. The terms of the enactment seem to me to make it reasonably clear that that is the law. The 1st section enacts in substance that, if any superior landlord shall levy a distress on any goods of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord with a declaration in writing made by such lodger, setting forth that such immediate tenant *has* no right of property or beneficial interest in the goods so distrained or threatened to be distrained upon, and that such goods *are* the property or in the lawful possession of such lodger. That is in the present tense, and clearly refers to the time when the distress is put in, and is not to be made good by a notice given upon a former occasion,—at all events where there has been time enough for the state of things to become altered. The clause then goes on to provide that the lodger's declaration shall also set forth whether any and what rent is due and for what period from such

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lodger to his immediate landlord; and such lodger may pay to the superior landlord the rent, if any, so due as last aforesaid or so much thereof as shall be sufficient to discharge the claim of such superior landlord,—all of which is capable of altering from time to time. It further provides that to such declaration shall be annexed a correct inventory subscribed by the lodger of the goods referred to in the declaration. The 2nd section is to this effect:—"If any superior landlord shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord the rent, if any, which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the goods of the lodger, such superior landlord, &c., shall be deemed guilty of an illegal distress." That clause is relied on as making the distress in this case illegal. I am, however, of opinion that s. 2 has not the effect contended for. A declaration and inventory served on the landlord on the occasion of a former distress cannot operate to render a distress made two or three weeks after, when the state of things is no longer the same, an illegal distress: there should have been a fresh declaration and inventory at the time of the distress made on the 21st of September. That being so, the distress in question was not illegal. But it is said that, inasmuch as the second seizure was made in respect of a portion of the rent for which the first seizure was made, the superior landlord was a trespasser; for that, where a landlord has once made a distress and has voluntarily abandoned it, he cannot again distrain the same (or any) goods in respect of the same rent: and for this the case of *Dawson* v. *Cropp* (1) was relied on. The mere fact, however, that the distress is for a larger sum than is really due does not of itself give a cause of action: there must be special damage alleged and proved. The learned judge at the trial ruled that, as the second distress had been put in for an amount for which the first distress had been levied, it was illegal within the Act, if the jury thought that the plaintiff was a lodger and that the defendant had withdrawn after the notice of that fact had been given to him; and that, notwithstanding further rent had accrued, the second distress was not lawful, inasmuch as it

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was levied for the amount of the first, plus the 20*s.* which had accrued due afterwards. He therefore held that, although 20*s.* additional rent was really due at the time of the second distress, the mere fact that the landlord had distrained for the old rent which remained unpaid as well as for the 20*s.* subsequently accruing, would give the plaintiff a cause of action. In so ruling he decided contrary to the cases which hold that distraining for a larger amount of rent than is due does not per se give a cause of action: there must be special damage. The learned judge therefore clearly misdirected the jury. I am of opinion that there is no ground in point of law for saying that the plaintiff here was not entitled to distrain for the 7*l.* rent which remained unpaid. It is clear that he did not voluntarily abandon the first distress. He withdrew partly because his immediate tenant entered into an arrangement for payment of 1*l.* and the liquidation of the balance by certain instalments, and partly because by reason of a claim made by the now plaintiff under the Lodgers' Goods Protection Act, he was unable to realize the amount due to him. On the 21st of September, the immediate tenant having failed to perform his engagement, and two weeks' rent having accrued due in the meantime, there being 8*l.* in arrear, he was I think entitled to have recourse to his common law right, unless the plaintiff again exercised the power given her by the Lodgers' Goods Protection Act by serving the landlord with a written notice and inventory containing all the requisites of s. 1, and all of the *present* and not of the *past*. No fact being in dispute between the parties, this disposes of the whole case in favour of the superior landlord. The rent distrained for was due, and nothing occurred to prevent him from exercising his right to distrain. The goods were therefore properly sold. No special damage was proved; nor was any alleged. I therefore come to the conclusion that this action was ill founded, and that the defendants are entitled to judgment.

MANISTY, J. There are two principal questions in this case; and it is, no doubt, one of very general importance. Those questions are,—first, whether this distress was, as between the superior landlord and the immediate landlord of the plaintiff, an

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unlawful distress or an irregular distress,—secondly, assuming it to be a distress for which as between those two no action lies, will the fact that the plaintiff was a lodger, upon the evidence given at the trial, entitle her to maintain this action?

Upon the first question the facts lie in the smallest possible compass. On the 1st of September, 1882, there was a sum of 8*l.* due to Wilding, the landlord, from his immediate tenant, for which Wilding had unquestionably a right to distrain. He did distrain for 8*l.* 3*s.*, the rent and costs. The present plaintiff, claiming to be a lodger owing no rent, gave the proper notice under the Lodgers' Goods Protection Act, and that distress came to an end, not by a simple withdrawal, but by the payment by the immediate tenant, Stephen Thwaites, to the landlord of 1*l.* and an undertaking to pay the balance (7*l.*) by weekly instalments of 10*s.* The tenant failed to perform that agreement. As between them, therefore, there was a right in the landlord to enforce his remedy against his tenant. *Dawson* v. *Cropp* (1) and *Bagge* v. *Mawby* (2) establish that if by an arrangement bonâ fide made a part only of the rent is paid, the landlord has a right to enter and make another distress. This is a bonâ fide case of a second distress by reason of the arrangement having fallen through. But, in addition to that, here 1*l.* further rent became due from the plaintiff's immediate landlord to the superior landlord. The second distress was for the same sum as the first, but it was not the same rent; it was compounded of 7*l.* the sum left unsatisfied on the first occasion, and 1*l.* the subsequently accruing rent. Apart, therefore, from the Lodgers' Goods Protection Act, Wilding, the superior landlord, was well within his legal right in distraining as he did on the 21st of September. At all events he was entitled to distrain for 1*l.*; but the goods realised far more than enough to satisfy that sum. Unless, therefore, he had a right to distrain for 8*l.* 3*s.*, I am not sure that he might not be liable in an action for an *excessive* distress. But, let us see what is the statement of claim. Not to put it too strictly, it charges in par. 3 that the defendants broke and entered the plaintiff's dwelling-house and rooms, and *wrongfully* distrained therein her goods as a distress for arrears of rent due from her immediate landlord to the defendant

(1) 1 C. B. 961. (2) 8 Ex. 641.

(Wilding), and took them away and converted or sold them. Then par. 4 says that after *the distress*,—that is, after the distress, not on the 1st of September, but on the 21st,—the defendants had notice under the statute that the plaintiff was a lodger and no rent was due from her, and that there was annexed to such notice a correct inventory subscribed by her in every respect as required by the statute; nevertheless that the defendants proceeded with *such distress* on the goods of the plaintiff as mentioned in par. 3. Now, if the plaintiff had stated the real fact, viz. that a distress was levied on the 1st of September, that that distress had been abandoned on the terms above mentioned, and that a second distress was put in on the 21st in part for the same and in part for additional rent, without shewing any notice or declaration under the Lodgers' Goods Protection Act, the question would have been raised on the record, and the statement of claim would have been bad in substance; and the judgment would have been entered for the defendants then and there. But, unfortunately, instead of that being so, the case went down to trial. How, then, does the case of the plaintiff stand under the Lodgers' Goods Protection Act? A distress was put in on the 1st of September, and a proper notice under the statute was duly served on the 5th. That distress having been withdrawn, a second distress was made on the 21st. If the present plaintiff had given on that occasion a notice and inventory as she did on the first occasion, she would have brought herself within the Lodgers' Goods Protection Act. But, while the legislature has given a certain protection to lodgers, it has accompanied it with a substantial condition that the immediate landlord shall have no interest in the property. But, as pointed out yesterday in the course of the argument, there might have been a change of property between the 1st and the 21st. If the second was a lawful and bonâ fide distress the landlord was entitled to have the declaration and inventory mentioned in s. 1 of the Act. And this is not matter of form only, but matter of substance. If the lodger cannot truly say that the goods distrained were his goods at the time of the distress, and that his immediate landlord has no right of property or beneficial interest in them, why should the superior landlord be deprived of his common law remedy for the recovery of his rent?

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Upon both questions, therefore, I think the defendants are entitled to succeed. The second distress was not a wrongful or illegal distress, and the plaintiff has not brought herself within the Lodgers' Goods Protection Act. There will therefore be judgment for the defendants, with costs.

Judgment for the defendants.

Solicitor for plaintiff: *Shakespear.*
Solicitor for defendants: *G. A. Haynes.*

J. S.

May 28.

JONES *v.* PARCELL AND THOMAS.
JENKINS, CLAIMANT.

Bankruptcy—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 87—*Seizure and Sale—"Proceeds" of Sale—Notice to Sheriff of Petition in Bankruptcy—Sale made on two different Days.*

Sect. 87 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), enacts that, where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding 50*l.*, and *sold*, the sheriff shall retain the *proceeds of such sale* in his hands for a period of fourteen days, and, upon notice being served on him within that period of a bankruptcy petition having been presented against such trader (followed by an adjudication), shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee.

On the 29th of December, 1882, an execution was issued at the suit of the plaintiff against the defendants, traders, upon a judgment for 87*l.* 19*s.* 4*d.* debt and costs, and lodged with the sheriff, who on the same day seized certain goods of the defendants and sold them on the 10th of January, 1883, realizing by that sale 41*l.* 12*s.* 7*d.* On the 12th of January other goods of the defendants which were upon other premises occupied by them were sold under the fi. fa., and realized 74*l.* 10*s.* 10*d.* On the 24th of January, 1883, a petition in bankruptcy was presented against the defendants, under which they were adjudicated bankrupts on the 19th of February. The sheriff had notice of the petition on the 25th of January:—

Held, that the trustee was entitled to the whole proceeds, as the "sale" contemplated by s. 87 of the Bankruptcy Act, 1869, was not completed until the 12th of January, within fourteen days from the receipt by the sheriff of notice of the filing of the petition.

JUDGMENT was recovered in an action by Jones against Parcell and Thomas, who were traders in partnership within the meaning of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), at Tenby, for 82*l.* debt, and 5*l.* 19*s.* 4*d.* costs. Execution was issued against

the defendants on the 29th of December, 1882, and lodged with the sheriff of Pembrokeshire who on the same day seized certain goods of the defendants. On the 10th of January the sheriff sold goods which realized 41*l.* 12*s.* 7*d.*, and at 4.30 the sheriff's representative stopped the sale in order to collect the money. Sufficient not having been obtained to satisfy the execution, fresh notices were then issued for another sale on the 12th of January at other premises in the occupation of the execution-debtors. At the last-mentioned sale a sum of 74*l.* 10*s.* 10*d.* was realized.

On the 24th of January, 1883, a petition in bankruptcy was presented against the defendants in the Pembroke Dock County Court, under which they were adjudicated bankrupts on the 19th of February, and a trustee was appointed on the 13th of March. Notice of the presentation of the petition was served upon the under-sheriff on the 25th of January. Upon an interpleader summons taken out by the sheriff, the question was whether the proceeds of the two sales on the 10th and 12th of January or either of them belonged to Jones, the execution-creditor, or to Jenkins, the trustee in bankruptcy of Parcell and Thomas, by virtue of s. 87 of the Bankruptcy Act, 1869. (1) The matter was referred by Manisty, J., to the Divisional Court.

Llewellyn Jones, for the claimant, the trustee. The question turns upon what is the true construction of s. 87 of the Act. Where the proceeds of the sale exceed 50*l.*, the sheriff or high-

(1) The 87th section enacts that "where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding 50*l.*, and sold, the sheriff, or in the case of a sale under the direction of the county court, the high bailiff or other officer of the county court, shall retain the proceeds of such sale in his hands for a period of fourteen days, and, upon notice being served on him within that period of a bankruptcy petition having been presented against such trader, shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee: but, if no notice of such petition having been presented be served on him within such period of fourteen days, or if, such notice having been served, the trader against whom the petition has been presented is not adjudged a bankrupt on such petition or on any other petition of which the sheriff, high bailiff, or other officer has notice, he may deal with the proceeds of such sale in the same manner as he would have done had no notice of the presentation of a bankruptcy petition been served on him."

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bailiff (as the case may be) is to retain the proceeds of such sale in his hands for a period of fourteen days; and if within such period he is served with notice of a petition in bankruptcy having been filed against the trader, followed by an adjudication, he is to hold them in trust for the trustee: see *Ex parte Rayner, In re Johnson* (1); *Ex parte Liverpool Loan Co., In re Bullen* (2). The word "proceeds" must refer to all the proceeds which come into the sheriff's hands; and the word "sold" must refer to a completed and not to a partial sale, as under s. 6, subs. 5: see *Ex parte Villars, In re Rogers.* (3) The fourteen days, therefore, must run from the 12th of January in this case, when the sale under the fi. fa. was complete: consequently, notice of the petition having been served upon the sheriff on the 25th, the proceeds of both days' sale belong to the trustee. *Turner* v. *Bridgett* (2) was also referred to.

English Harrison, for the execution-creditor. The 87th section may be read distributively. As regards 41*l.* 12*s.* 7*d.*, the proceeds of the first day's sale which were actually received by the sheriff, the fourteen days had expired before the notice in bankruptcy was served, and therefore he holds that money for the execution-creditor, and must pay it over to him. The goods sold on the 12th were in another house. That, therefore, must be considered to all intents and purposes as a separate sale.

[LOPES, J. Can the goods be said to be "sold" until the sale is completed?]

The sale on the 10th of January was completed, and the proceeds of that sale collected and in the sheriff's hands on that day. It often happens, as here, that the execution-debtor has goods at more places than one,—it may be in different counties; and many days may elapse between the commencement and the completion of the execution. The observations of Mellish, L.J., in *Ex parte Villars, In re Rogers* (3), are merely dicta not necessary for the decision of that case; and the Lord Justice himself concurred in the reversal of the judgment in the full Court of Appeal.

(1) Law Rep. 7 Ch. 325.
(2) Law Rep. 7 Ch. 732.
(3) Law Rep. 9 Ch. 432.
(4) 8 Q. B. D. 392.

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Cock, for the sheriff, also submitted that s. 87 was to be read distributively, and that the duty of the sheriff was to retain the proceeds of the sale for fourteen days from the time when he received them.

POLLOCK, B. The 87th section of the Bankruptcy Act, 1869, enacts that "where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding 50*l.*, and sold, the sheriff shall retain the proceeds of such sale in his hands for a period of fourteen days, and, upon notice being served on him within that period of a bankruptcy petition having been presented against such trader" (followed by an adjudication), "shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee." The facts in the present case are these:— On the 29th of December, 1882, an execution was issued at the suit of Jones against Parcell and Thomas, traders, upon a judgment for 87*l.* 19*s.* 4*d.* debt and costs, and lodged with the sheriff of Pembrokeshire, who on the same day seized certain goods of the defendants, and sold them on the 10th of January, 1883, realizing by the sale 41*l.* 12*s.* 7*d.* On the 12th of January, other goods of the defendants which were upon other premises occupied by them were sold under the fi. fa., and realized 74*l.* 10*s.* 10*d.* On the 24th of January, 1883, a petition in bankruptcy was presented against the defendants in the Pembroke Dock County Court, under which they were adjudicated bankrupts on the 19th of February, and the claimant, Jenkins, was duly appointed trustee on the 13th of March. The sheriff had notice of the petition on the 25th of January. Now, I do not say that some doubt has not arisen in my mind as to the date from which the period of fourteen days is to run. When the sheriff has seized the debtor's goods, it is his duty to go on settling until he shall have realized enough to satisfy the exigency of the writ. The word "sold" in s. 87 is important. Until the goods are sold the operation of that section does not arise. In my opinion, the sheriff cannot be said to have sold the goods until the sale is complete: and the sale is not completed until enough has been sold to satisfy the claim of the execution-creditor. And the words "the proceeds of such sale" must necessarily mean the whole proceeds of all sales made

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to satisfy the judgment, and not the proceeds of a partial sale. That being so, I am of opinion that, the sheriff having received notice of the petition in bankruptcy on the 25th of January, which was within fourteen days from the day of the completion of the sale under the fi. fa. (viz. the 12th), the proceeds of the sale,—the proceeds of both sales,—were held by him on trust to pay the same to the claimant, the trustee in bankruptcy, and consequently that he must be directed to withdraw; the costs of the claimant to be paid by the execution-creditor.

LOPES, J. I am of the same opinion. The point is this,—Where a sale under a fi. fa. occupies two or more days, from what date does the period of fourteen days mentioned in s. 87 of the Bankruptcy Act, 1869, begin to run? I think from the time when all the goods are sold. That seems to me to be the true construction of the section. I agree with the learned Baron that the trustee in bankruptcy is entitled to the "proceeds of the sale," that is, the whole proceeds, and that the sheriff must withdraw.

CAVE, J. I am of the same opinion, and for the same reasons.

Order accordingly.

Solicitors for claimant: *Parkers, for C. W. R. Stokes, Tenby.*

Solicitors for Jones: *Jones, Blaxland, & Son, for R. D. Gilbertson, Pembroke.*

Solicitors for sheriff: *Crowdie, Anstie, & Vizard.*

J. S.

[IN THE COURT OF APPEAL.]

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May 10.

MUNSTER *v.* RAILTON & CO.

Practice—Action against Partners in Name of Firm—Appearance by one Partner only—Judgment entered against Partner appearing instead of against Firm—Application to issue Execution against other Partner—Amendment of Judgment—Order XII., r. 12; *Order XLII., r.* 8.

The plaintiff issued a writ against the firm of R. & Co. R. only appeared to the writ, and the plaintiff delivered statement of claim against "R. sued as R. & Co." Issue having been joined, the case proceeded to trial, when a verdict for the plaintiff was taken by consent, and judgment signed against "R. sued as R. & Co." The plaintiff having subsequently discovered that C. had been a member of the firm of R. & Co., applied for an order to amend the judgment by making it, in accordance with the writ, a judgment against the firm of R. & Co.:—

Held, that the amendment ought not to be allowed, for the plaintiff, although he acted in ignorance of the facts, must be taken to have elected to sue R. alone, and was concluded by the form of the proceedings subsequent to the appearance.

Judgment of the Queen's Bench Division (10 Q. B. D. 475) reversed.

APPEAL of R. C. Cox from an order of Williams and Mathew, JJ. (1) The facts, as they appeared at the hearing before the Court of Appeal, may be stated as follows:—

The writ of summons was issued in February, 1882, and directed to R. J. Railton & Co., and was served on the defendant, R. J. Railton: he appeared as "Richard Johnson Railton trading as R. J. Railton & Co." The claim described the action as being brought between the plaintiff Munster and R. J. Railton, and the proceedings were in this form up to the trial. The action was for libel, and at the trial a verdict was taken by consent for 40*s.* damages. There was some evidence to shew that Cox was present at the trial, and was consulted as to what should be done. Judgment was entered up against "R. J. Railton sued as R. J. Railton & Co." Afterwards the plaintiff discovered that Cox had been in partnership with R. J. Railton, and it appeared that a memorandum of dissolution had been executed between them in January, 1882. The plaintiff then applied to have the judgment amended by entering it up against the firm "R. J. Railton & Co."

(1) 10 Q. B. D. 475.

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as a preliminary to an application under Order XLII., rule 8. The Queen's Bench Division having granted the application (1), Cox appealed.

Willis, Q.C., and *Gore*, for Cox. The plaintiff elected to proceed against Railton alone, and he cannot now issue execution against Cox. Order XVI., rule 10, gives power to any party to an action to ascertain who are the co-partners to a firm that is party to it; but the plaintiff took no steps to ascertain whether Railton had a partner. At common law the judgment was in accordance with the pleadings; it is true that in *Jackson* v. *Litchfield* (2) it was said that at common law the judgment must follow the writ; but that was a case of judgment for default of appearance. The judgment in the present case is clearly not against the partners in the firm; it expresses the result of the pleadings. In *Large* v. *Large* (3) it was held that when a statement of claim had been delivered, it was unnecessary to amend the writ; and the reason for that decision is that a writ of summons is merely the process to bring the defendant before the Court. The plaintiff was not misled, for he elected to proceed against Railton alone. The service of the writ of summons was an equivocal act; the intention might be to bring the action against Railton or against a firm in which he was a partner; and at the present stage it must be taken that the plaintiff did not intend to sue the firm.

Woollett, and *Tindal Atkinson* (*Coghill*, with them), for the plaintiff. Notwithstanding the proceedings which have taken place the judgment may be amended, and the discretion of the judges of the Queen's Bench Division ought not to be overruled. Cox must have known that R. J. Railton was liable to be sued for libel, and he therefore colourably withdrew from the partnership.

[COTTON, L.J. In *Ex parte Young* (4) Lord Selborne, L.C., was of opinion that a judgment against a firm is not conclusive of the liability of any person who has neither admitted on the pleadings that he is, nor has been adjudged to be a partner in the

(1) 10 Q. B. D. 475.
(2) 8 Q. B. D. 474, at pp. 477, 478.
(3) W. N. 1877, p. 198.
(4) 19 Ch. D. 124, at p. 133.

firm sued, and who has not been served as a partner with the writ of summons.]

The plaintiff cannot try the liability of Cox in a fresh action for libel against Cox, for Cox can plead in the alternative the recovery of the judgment in this action against Railton, who according to the plaintiff's case is a joint wrongdoer with Cox: *Kendall* v. *Hamilton*. (1) Therefore the amendment proposed is the plaintiff's only remedy. The amendment will do no injustice; the proceedings have been altogether wrong, and the plaintiff simply asks that they may be rectified. *Jackson* v. *Litchfield* (2) shews that the judgment must follow the writ of summons. The plaintiff was misled and deceived by the appearance.

Gore, in reply, was stopped.

COTTON, L.J. The Queen's Bench Division has ordered the judgment to be amended so that it may be a judgment against the firm of "R. J. Railton & Co.," in order that the plaintiff may take proceedings against the members of the firm. It appears that Cox and Railton had been in partnership; but a memorandum was executed in January, 1882, whereby the partnership was dissolved. This action was commenced in the February following against the partners, and it was brought against them in the partnership name: it was therefore an action against the firm. It has been held that if a partner who has not been served with the writ of summons does not appear, judgment cannot be obtained against him separately, but judgment must be entered against the firm, and the partner must be proceeded against under Order XLII., rule 8. In this case the defendant entered an appearance as "R. J. Railton, trading as R. J. Railton & Co." The subsequent proceedings were against him alone, and he was treated as a sole defendant. The Queen's Bench Division has altered the judgment against R. J. Railton into a judgment against the firm. If the plaintiff had proceeded with his action against the firm, he might have obtained execution against whoever might happen to be a member of it. Under other circum-

(1) 4 App. Cas. 504. (2) 8 Q. B. D. 474.

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stances the plaintiff might have obtained an amendment, but he has adopted the proceedings against R. J. Railton alone, and nevertheless he now seeks to obtain the same benefit as if he had proceeded against the firm: he has taken by consent judgment against one man alone, and he ought not now to be allowed to gain the same advantage as if he had followed a different procedure. It is a judgment against an individual alone. It is said that the defendant and Cox have been guilty of fraud and deception upon the plaintiff: even if this had been the case, the utmost to which he would have been entitled would have been to set aside the judgment and to have a new trial; but I am not satisfied that there were fraud and deception; there was a memorandum of dissolution of the partnership between Railton and Cox; and if Cox had entered an appearance in the action, it would have confirmed the view that he was really a partner. It is not made out that the plaintiff was deluded. It is too late for the plaintiff to apply to alter the judgment: I think that the judgment of the Queen's Bench Division was wrong.

BOWEN, L.J. I am of the same opinion. I desire to add a few words to what has fallen from Cotton, L.J., only because we are overruling the decision of the Queen's Bench Division, and also because our judgment may seem at first sight to savour of techicality; but it is not a question of technicality; we must observe the substantial forms of justice. The action was brought against the firm, and by the plaintiff's own election it was converted into an action against an individual; but he now endeavours to set aside the judgment properly signed against the individual, and to turn it into a judgment against the firm so as to bind a person who has by the plaintiff's own choice been made a stranger to the action. It having been begun against the firm, Railton appeared not simply as an individual: the writ having been served at the place of business, the appearance was entered by "R. J. Railton, trading as R. J. Railton & Co." By Order IX., rule 6, it is provided that "where partners are sued in the name of their firm, the writ shall be served either upon any one or more of the partners, or at the principal place within the jurisdiction of the business of the partnership upon any person having at

the time of service the control or management of the partnership business there; and, subject to the rules hereinafter contained, such service shall be deemed good service upon the firm." Rule 6a is similar, and these rules appear to have been acted upon by the plaintiff in the present case; and so far he was right. The provisions as to appearance are contained in the subsequent orders; and by Order XII., rule 12, "where partners are sued in the name of their firm, they shall appear individually in their own names; but all subsequent proceedings shall nevertheless continue in the name of the firm." Then comes the rule applicable to the present case. By Order XII., rule 12a, "where any person carrying on business in the name of a firm apparently consisting of more than one person, shall be sued in the name of the firm, he shall appear in his own name; but all subsequent proceedings shall, nevertheless, continue in the name of the firm." R. J. Railton entered an appearance in a delusive manner, that is to say, the appearance was delusive if any person was in partnership with him; and if the argument for the plaintiff is correct, he was deluded because Cox was still a partner; but the plaintiff did not, as he might have done, go on with the action against the firm; he elected to proceed against Railton alone. It is true that he did not amend the writ; but the statement of claim converted the action into an action against Railton alone. The action went on to trial, Railton being the sole defendant: it appears that Cox took some interest in the proceedings, but the fact that he took interest in them and watched the result of the trial, did not make him a party to the action. Railton consented to a verdict against himself, upon which judgment was entered. It was afterwards found out that Cox at all events had been in partnership with Railton, and, as the plaintiff has contended, was in partnership with him at the time of issuing the writ. The plaintiff's proper course would have been to apply to set aside all proceedings subsequent to the time, when he departed from the ordinary mode of prosecuting an action against a firm; but he has not asked for this, and instead of it he asks that the judgment may be amended without amending the pleadings: I think that we should be defeating the substantial forms of justice, if we were to accede to this application; it has been argued that Cox

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has misled the plaintiff; but there is a salutary rule which enables a plaintiff who is suing a firm, to find out who are the partners with a defendant appearing to the writ: I allude to Order XVI., rule 10. If the plaintiff has any redress, he must ask that the whole proceedings may be begun again from the service of the writ and the entry of appearance. We cannot grant the application now made to us.

Appeal allowed.

Solicitor for plaintiff: *W. Brewer.*
Solicitors for Cox: *Palmer & Bull.*

J. E. H.

June 22.

[IN THE COURT OF APPEAL.]

ABRATH *v.* THE NORTH EASTERN RAILWAY COMPANY.

Malicious Prosecution—Reasonable and Probable Cause—Burden of Proof—Direction to Jury.

In an action for malicious prosecution the burden of proof as to all the issues arising therein lies upon the plaintiff; and although the plaintiff proves that he was innocent of the charge laid against him, and although the judge in order to enable himself to determine the issue of reasonable and probable cause, leaves subsidiary questions of fact to the jury, nevertheless the onus of proving the existence of such facts as tend to establish the want of reasonable and probable cause on the part of the defendant, rests upon the plaintiff.

Decision of the Queen's Bench Division, ante, p. 79, reversed.

The plaintiff, a surgeon, had attended one M. for bodily injuries alleged to have been sustained in a collision upon the defendants' railway. M. brought an action against the defendants, which was compromised by the defendants paying a large sum for damages and costs. Subsequently the directors of the defendants' company, having received certain information, caused the statements of certain persons to be taken by a solicitor; these statements tended to shew that the injuries of which M. complained were not caused at the collision, but were produced wilfully by the plaintiff, with the consent of M., for the purpose of defrauding the defendants. These statements were laid before counsel, who advised that there was good ground for prosecuting the plaintiff and M. for conspiracy. The defendants accordingly prosecuted the plaintiff, but he was acquitted. In an action for malicious prosecution, the judge directed the jury to find whether the defendants had taken reasonable care to inform themselves of the true state of the case, and whether they honestly believed the case which they laid before the magistrates; the jury having answered these

questions in the affirmative, the judge entered the judgment for the defendants:—

Held, that the direction to the jury was correct, that upon the facts and the findings of the jury, the defendants had reasonable and probable cause for prosecuting the plaintiff, and that the judge had rightly entered the judgment for the defendants.

ACTION for malicious prosecution.

At the trial before Cave, J., and a jury, at the Durham Summer Assizes, 1882, the following material facts were proved in evidence, or admitted:—

On the 10th of September, 1880, a collision occurred at Ferry Hill station, on the defendants' railway, and one M. McMann alleged that he had thereby sustained injuries. McMann was attended by the plaintiff, G. A. Abrath, a doctor of medicine and surgery, and McMann brought an action against the defendants to recover damages. The action by McMann stood for trial at the Northumberland Summer Assizes, 1881, but it was settled by the defendants paying to the plaintiff McMann, 725*l.* damages, and 300*l.* costs.

After the settlement, the directors of the defendants' company received certain information from Rayne, a surgeon, who was the medical adviser of the railway company in reference to accidents, and who was authorised to employ detectives on behalf of the company. The directors thereupon employed a solicitor named Dix, to see certain persons and take their statements. Some of these persons were relatives of McMann, and others were well acquainted with him, and their statements, if true, shewed that a fraud had been perpetrated on the defendants; that McMann had not been seriously injured in the collision, that the injuries of which McMann had complained had been wilfully produced by the present plaintiff, Dr. Abrath, with the consent of McMann, for the purpose of getting money from the defendants. These statements were submitted to the directors of the defendants' company, who thereupon ordered that the opinion of counsel should be taken, and counsel advised that there was a good case for prosecuting a charge of conspiracy against McMann and Dr. Abrath, his medical adviser. Two eminent medical men were of opinion that the case of the alleged injuries to McMann was an imposture.

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Thereupon the defendants caused an information to be laid before justices, against the plaintiff, Dr. Abrath, on a charge of conspiracy to cheat and defraud the defendants. He was committed for trial and was tried in January, 1882, and acquitted, the foreman of the jury adding that it was the unanimous wish of the jury that he should leave the Court without a stain upon his character. He thereupon commenced the present action, and at the trial certain witnesses were called who were acquainted with McMann, and gave evidence to shew that his injuries were real and not feigned, and these witnesses had not been seen on behalf of the defendants before they instituted proceedings against the plaintiff. It was also shewn that the persons on whose statements the directors had ordered the prosecution to be instituted against the plaintiff, were of bad character, and one of them had been convicted several times, and also that their own statements, if true, established that they were accomplices with the plaintiff and McMann in the conspiracy. For the defendants it was not disputed that the plaintiff was innocent of the conspiracy, but it was contended that they were justified in instituting the prosecution upon the faith of the statements laid before the directors.

Cave, J., in summing up to the jury, told them that it was for the plaintiff to establish a want of reasonable and probable cause and malice, and then proceeded as follows: "I think the material thing for you to examine about is, whether the defendants in this particular case took reasonable care to inform themselves of the true facts of the case. That, I think, will be the first question you will have to ask yourselves—did they take reasonable care to inform themselves of the true facts of the case? Because, if people take reasonable care to inform themselves, and notwithstanding all they do, they are misled, because people are wicked enough to give false evidence, nevertheless they cannot be said to have acted without reasonable and probable cause; with regard to this question, you must bear in mind that it lies on the plaintiff to prove that the railway company did not take reasonable care to inform themselves. The meaning of that is, if you are not satisfied whether they did or not, inasmuch as the plaintiff is bound to satisfy you that they did not, the railway company would be entitled to your verdict on that point. Then

there is another point, and that is, when they went before the magistrates, did they honestly believe in the case which they laid before the magistrates? If I go before magistrates with a case which appears to be good on the face of it, and satisfy the magistrates that there ought to be a further investigation, while all the time I know that the charge is groundless, then I should not have reasonable and probable cause for the prosecution. Therefore, I shall have to ask you that question along with the others, and according as you find one way or the other, then I shall tell you presently, or I shall direct you, whether there was or was not reasonable and probable cause for this prosecution. If you come to the conclusion that there was reasonable and probable cause, or rather that those two questions should be answered in the affirmative—that is, that the defendants did take care to inform themselves of the facts of the case, and they did honestly believe in the case which they laid before the justices, then I shall tell you, in point of law, that this amounts to reasonable and probable cause, and in that case the defendants will be entitled to your verdict; if, on the other hand, you come to the negative conclusion, if you think that the defendants did not take reasonable care to inform themselves of the facts of the case, or that they did not honestly believe the case which they laid before the magistrates, then in either of those cases you will have to ask yourselves this further question, were they in what they did actuated by malice, that is to say, were they actuated by some motive other than an honest desire to bring a man whom they believed to have offended against the criminal law to justice? If you come to the conclusion that they did honestly believe that, then they are entitled again to your verdict, but if you come to the conclusion that they did not honestly believe that, but that they were actuated by some indirect motive other than a sincere wish to bring a supposed guilty man to justice, then the plaintiff is entitled to your verdict, and then it will become necessary to consider the question of damages."

The learned judge then commented upon the facts of the case, pointing out that if the injuries to McMann were feigned and produced wilfully, and if his case was one of imposture, the defendants would be compelled to rely upon the evidence of persons

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who were aware what was going on, and further pointing out that as to the fact of conspiracy the defendants could not expect to obtain the evidence of persons of good character; he then proceeded as follows: "Now, gentlemen, these are the circumstances which I think point to the question of reasonable care having been taken, Did they take, or did they not take, reasonable care in informing themselves of the true facts of the case? As I have said just now, the plaintiff has to satisfy you that they did not; if you are satisfied that they did, you ought to answer that question in favour of the defendants. If, however, you are satisfied that they did not take reasonable care, then you must answer it for the plaintiff."

The learned judge concluded his summing-up as follows: "The questions which I ask you are these:—First, did the defendants take reasonable care to inform themselves of the true state of the case? Secondly, did they honestly believe the case which they laid before the magistrates? If both questions are answered in the affirmative, that they did take reasonable care, and they honestly believed the case they laid before the magistrates, that is a verdict for the defendants, because, please bear in mind, that it is for the plaintiff to prove that they did not. Then if either question is answered in the negative, that is, if the defendants did not take reasonable care, or if they did not honestly believe the case which they laid before the magistrates, then you must ask yourselves this further question, were the defendants actuated by any indirect motive in preferring this charge? If they were not, then again your verdict must be for the defendants. If they were, then you must find your verdict for the plaintiff, and then in that case you must ask yourselves what damages you give."

The jury found, first, that the defendants had taken reasonable care to inform themselves of the true state of the case; and, secondly, that the defendants honestly believed the case which they laid before the magistrates. The jury did not answer the third question. The learned judge held that these findings amounted to a verdict for the defendants, and gave judgment for the defendants.

The plaintiff having obtained in the Queen's Bench Division

a rule for a new trial on the ground of misdirection, it was made absolute by Grove and Lopes, JJ. (1). These learned judges were of opinion that in an action for malicious prosecution where the defendant undertakes to bring forward facts for the purpose of satisfying not the jury but the judge that there was reasonable and probable cause for prosecuting, the onus of proving those facts is upon the person who brings them forward; that the defendants only could know whether they had taken reasonable and proper care to inform themselves of the true state of the case, and whether they honestly believed the case which they laid before the magistrates; that the general rule should be followed, which was that the onus rested on the person affirming; and that there had been a misdirection by Cave, J., in telling the jury that the onus lay upon the plaintiff to prove that the defendants had not taken reasonable care to inform themselves of the true state of the case, and had not honestly believed the case which they laid before the magistrates.

The defendants appealed.

During the argument in the Court of Appeal it was agreed by the parties and ordered by the judges that the plaintiff should be at liberty to appeal from the judgment of Cave, J., and to raise the questions whether there was reasonable and probable cause for instituting the prosecution and whether the judgment had been rightly entered by Cave, J., on the findings of the jury.

June 20, 21, 22. *Sir F. Herschell, S.G.*, and *Digby Seymour, Q.C.* (*Gainsford Bruce* and *J. L. Walton* with them), for the defendants. The burden of proof was on the plaintiff: it was incumbent on him to shew that the defendants prosecuted him without reasonable or probable cause: *Mitchell* v. *Jenkins* (2); *Walker* v. *South Eastern Railway Company* (3). An action for malicious prosecution is one of the exceptions to the rule that a party is not bound to prove a negative: 1 Greenleaf on Evidence, part 2, ch. 3, par. 78, p. 98 (13th ed.). Further the plaintiff was bound to prove that the defendants acted maliciously, that is,

(1) Ante, p. 79.

(2) 5 B. & Ad. 588, at p. 595.

(3) Law Rep. 5 C. P. 640, at p. 644.

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wrongfully; and "malice in a legal sense means a wrongful act done intentionally without just cause or excuse:" per Martin, B., in *Johnson* v. *Emerson* (1), citing *McPherson* v. *Daniels*. (2) It was for the plaintiff to prove the absence of an honest belief on the part of the defendants that he was guilty of conspiracy: *Turner* v. *Ambler*. (3) The burden of proof rested upon the plaintiff throughout the trial: *Sutton* v. *Sadler* (4); *Pickup* v. *Thames Insurance Co.* (5). If the facts laid before the magistrates by the defendants shewed a primâ facie case of conspiracy against the plaintiff, their effect cannot be displaced by proof that other evidence might have been given. The finding of the jury may mean either that the defendants did take proper care to institute inquiries, or that they were not satisfied that the defendants did not make reasonable inquiries; whichever the jury may have meant, the defendants are entitled to succeed. There was no misdirection; but if there had been any, it would be immaterial; it was for the jury to find the facts on which the question of reasonable and probable cause depended, but the judge must determine whether the facts found did constitute reasonable and probable cause: *Lister* v. *Perryman*. (6) If the decision of the Queen's Bench Division be upheld, the difference between an action for trespass and false imprisonment and an action for malicious prosecution will be wholly done away with and lost. (7)

Sir H. Giffard, Q.C., and *McClymont*, for the plaintiff. For the defendants it is not now contended that the plaintiff was guilty of the offence of conspiracy; and as he was innocent, and as at the trial of this action no evidence was adduced of any facts leading to the conclusion that he was guilty, a case of malicious prosecution was made out. It is unnecessary for the plaintiff to

(1) Law Rep. 6 Ex. 329, at p. 373.
(2) 10 B. & C. 263, at p. 272.
(3) 10 Q. B. 252.
(4) 3 C. B. (N.S.) 87, at p. 98; 26 L. J. (C.P.) 284, at p. 287.
(5) 3 Q. B. D. 594.
(6) Law Rep. 4 H. L. C. 521.
(7) Sir F. Herschell, S.G., in the course of his argument, stated that he should contend, if it became necessary for him to do so, that the defendants being a corporation no action would lie against them for malicious prosecution, and that this question was not concluded by authority before a court of appeal. *Edwards* v. *Midland Ry. Co.* (6 Q. B. D. 287) was cited by Fry, L.J.; owing to the view taken by the Court in delivering judgment, it is unnecessary to notice this point further.

4/5 C Sp 48. 1150

contend that evidence of innocence alone is primâ facie evidence of want of reasonable and probable cause and of malice. No doubt the burden of proof was in the first instance upon the plaintiff; but it shifts continually: *Waring* v. *Waring* (1); and it is impossible to lay down any rule as to when the burden of proof must be taken to have shifted; suppose that upon an indictment for felony the defence is an alibi; it would be a misdirection for the judge to tell the jury that if they are in doubt as to the truth of the alibi they must acquit the accused; for the burden of proving the alibi is upon the accused who sets it up; and yet the burden of proving the accused to be guilty is upon the Crown. In an action for malicious prosecution the plaintiff need prove only that he was prosecuted at the instigation of the defendant, without reasonable or probable cause, and with malice. The burden of proof lies on him who insists on the affirmative, and in the present case the defendants insisted that they had used due care in making reasonable inquiries. Suppose an indictment for bigamy to which the defence is that the first marriage was void; surely it is for the defendant to give evidence impeaching the validity of the first marriage; this appears to have been the course adopted in *Rex* v. *Butler* (2), although it was ultimately in effect decided that the burden of proof had shifted, and that the Crown was bound to displace the case set up by the accused. The burden of proof of a fact lying within the peculiar knowledge of a party to a legal proceeding lies upon him, and in 1 Phillipps on Evidence, ch. 11, p. 556 (10th ed.), it is said that "in an action for penalties under the old game laws, though the plaintiff must aver, in order to bring the defendant within the act, that he was not duly qualified, yet it is not necessary to disprove his qualification, but it will be for the defendant, if he can, to prove himself qualified." *Rex* v. *Turner* (3), which was a conviction for breach of the game laws, was to the same effect. In the present case the facts as to the inquiries made by the defendants lay exclusively within their knowledge. A prosecution may be not only maliciously instituted, but also maliciously continued; for if fresh facts tending to show innocence come to light during the

(1) 6 Moore, P. C. 341, at p. 355. (2) Russ. & Ry. 61.
(3) 5 M. & S. 206.

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investigation, the prosecution will become malicious unless it be discontinued. At the trial of this action the defendants admitted that the plaintiff was innocent, and their only excuse was that they had been misled. The expressions of the judges in *Willans* v. *Taylor* (1) support the contention for the plaintiff.

[BOWEN, L.J. :—That case appears to have been decided on its special facts; the evidence of the defendant was material to support the indictment, but he declined to appear as a witness.]

The real question is, which party is putting forward the bonâ fide exercise by the defendants of the power of inquiry, and this is a matter which it is plainly for the defendants to establish.

In support of the appeal against the judgment of Cave, J., if this Court is of opinion that there was no mis-direction, it is contended upon the admitted facts and upon the findings of the jury that there was a want of reasonable and probable cause for instituting the prosecution against the plaintiff for conspiracy. The directors ought to have acted with more caution: they accepted and acted upon the statements of persons who, if there had been a conspiracy to defraud the defendants, must have been parties to it: evidence coming from a tainted source ought to have been viewed with suspicion and rejected.

The counsel for the defendants were not called upon to reply.

BRETT, M.R. This is an action for malicious prosecution, and the alleged offence for which the plaintiff was prosecuted was a conspiracy with a person named McMann to cheat and defraud the defendants. The points, which it is necessary for the plaintiff to substantiate in order to make out his claim, are not really in doubt: they have been decided over and over again, and have been decided for more than one hundred years; it is not enough for the plaintiff to shew, in order to support the claim which he has made, that he was innocent of the charge upon which he was tried; he has to shew that the prosecution was instituted against him by the defendants without any reasonable or probable cause and with a malicious intention in the mind of the defendants, that is, not with the mere intention of carrying the law into effect,

(1) 6 Bing. 183; 3 Moo. & P. 350; 2 B. & Ad. 845.

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but with an intention which was wrongful in point of fact. It has been decided over and over again that all these points must be established by the plaintiff, and that the burden of each of them lies upon the plaintiff.

In considering this case, I find great difficulty in expressing myself clearly, and I shall say at the outset that I envy the clearness with which my brother Cave summed up this case to the jury. I wish I could express what I intend to say as clearly and as concisely as he stated this case to the jury. A summing-up in an action for malicious prosecution I have never read which I more admired. In order to establish the plaintiff's claim, I have said that he must make out three propositions; and if he fails in making out any one of them, he fails in proving what is necessary to support his claim. It is admitted that the burden of proof of the whole lies upon the plaintiff, and that the burden of proof of each of the major divisions lies upon him; but it is said that if in any one of those three propositions a minor proposition is raised which must be proved in order to support the proposition in question, then the burden of proof is not upon the plaintiff. Now it seems to me that whenever a claim or defence consists of several necessary parts, he on whom the burden of proof of the whole rests, has also on him the burden of proof of each of those necessary parts. The burden of proof lies on the plaintiff to shew that there was an absence of reasonable and probable cause: if in order to shew the absence of reasonable and probable cause there are minor questions which it is necessary to determine, it seems to me that the burden of proving each of those minor questions lies upon the plaintiff, just as much as the burden of proving the whole does. In order to shew that there was an absence of reasonable and probable cause for instituting the prosecution for conspiracy, I cannot doubt that the plaintiff was bound to give some evidence of the circumstances under which the prosecution was instituted, and I wholly differ from the suggestion that it is sufficient for the plaintiff to shew that he was innocent of conspiracy, and that in the end there was no substantial ground for charging him with conspiracy. If the plaintiff merely proved that, and gave no evidence of the circumstances under which the prosecution was instituted, it seems that the plaintiff would fail;

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and a judge could not be asked, without some evidence of the circumstances under which the prosecution was instituted, to say that there was an absence of reasonable and probable cause. The evidence, which is to determine the question whether there was reasonable and probable cause, must consist of the existing facts or the circumstances under which the prosecution was instituted. In the present case, evidence was given of circumstances upon which the learned judge had to determine, whether they amounted to reasonable and probable cause for instituting the prosecution. These facts or circumstances being in evidence, another question of fact arose which it was necessary to determine in order to enable the judge to give his opinion upon all the existing circumstances and facts. That additional question of fact was, whether the defendants had taken reasonable care to inform themselves of the true state of the case. Strong evidence had been given that certain testimony or statements had been laid before those who instituted the prosecution for which the action was brought. If the point whether reasonable care had been taken, had not been raised, the judge would not have assumed a want of reasonable care in that respect; it would have been assumed on all sides that reasonable care had been taken. But it signifies not what statements were laid before those who instituted the prosecution, if they received them carelessly, or if they did not take reasonable care to inform themselves of other facts with which they might have made themselves acquainted. It has been decided that the question whether reasonable care has been taken by those who instituted the proceedings, to inform themselves of the true state of the case, must be determined one way or the other, in order to enable the judge to give his opinion. Therefore, it becomes a necessary part of the question whether there was an absence of reasonable cause, to determine whether reasonable care was taken by the defendants to inform themselves of the true state of the facts. The question, whether reasonable care has or has not been taken by a prosecutor to inform himself of the real state of the case, is not merely a piece of evidence to prove some fact, but it is a question which is itself to be decided by evidence, and upon which evidence to prove and disprove it may be given. It is a necessary part of the question whether there was reasonable

and probable cause, because if there has been a want of reasonable care on the part of the prosecutor to inform himself of the true state of the case, then there must be a want of reasonable and probable cause. It is one of those facts for which I have tried to find a proper designation, but I have not succeeded in finding one satisfactory to my mind; it may be described as a "fundamental" fact, in order to try to distinguish it from a fact which is merely evidence of something else. It is a fact which it would be necessary to allege and prove, and it is not merely a fact which is evidence of something which is to be alleged and proved.

Therefore, it is to my mind a fact of which the burden of proof lies upon the person who alleges it, and it falls within the rule which I have stated. The burden of proof of satisfying a jury that there was a want of reasonable care lies upon the plaintiff, because the proof of that want of reasonable care is a necessary part of the larger question, of which the burden of proof lies upon him, namely, that there was a want of reasonable and probable cause to institute the prosecution. It follows, therefore, to my mind, that if the direction of Cave, J., to the jury was simply that it was a necessary part of the question whether there was a want of reasonable and probable cause for instituting the prosecution against the plaintiff, that it should be decided whether reasonable care had been taken by the defendants to inform themselves of the true state of the case, and that the burden of proving that minor proposition, as well as the whole proposition, lay upon the plaintiff, it is a direction which cannot be impeached. This was in substance the direction of Cave, J., and I feel certain that his meaning was understood by the jury. However, the learned judges in the Divisional Court have thought that there was a mis-direction.

The contention for the plaintiff was thus stated by Grove, J. (1): "The alleged misdirection in this case was in the learned judge, before whom the action was tried, stating to the jury that the onus of proof was upon the plaintiff of proving that the defendants did not take reasonable and proper care to inform themselves of the true state of the case in prosecuting the plaintiff, and that they did not honestly believe the case which they laid before the

(1) Ante, p. 81.

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magistrates." In other words, it was contended for the plaintiff, that Cave, J., was wrong in stating to the jury that it was incumbent upon the plaintiff to satisfy the jury that the defendants had not taken reasonable care to inform themselves of the true state of the case. After reading the judgment of Grove, J., I feel considerable doubt what was the real ground of the decision. I agree that if the question to be decided is whether there has been reasonable inquiry as to the truth of the case, and if the plaintiff gives evidence which, unless it be answered, ought to lead the jury to the conclusion that there has been a want of reasonable inquiry, and if the defendant gives no evidence at all, the jury ought to find the question in favour of the plaintiff. I further agree that if the defendant gives evidence of facts which he desires to prove, it lies upon him to satisfy the jury that the circumstances alleged in his evidence are correct. But then it is contended (I think fallaciously,) that if the plaintiff has given primâ facie evidence, which, unless it be answered, will entitle him to have the question decided in his favour, the burden of proof is shifted on to the defendant as to the decision of the question itself. This contention seems to be the real ground of the decision in the Queen's Bench Division. I cannot assent to it. It seems to me that the propositions ought to be stated thus: the plaintiff may give primâ facie evidence which, unless it be answered either by contradictory evidence or by the evidence of additional facts, ought to lead the jury to find the question in his favour: the defendant may give evidence either by contradicting the plaintiff's evidence or by proving other facts: the jury have to consider upon the evidence given upon both sides, whether they are satisfied in favour of the plaintiff with respect to the question which he calls upon them to answer; if they are, they must find for the plaintiff; but if upon consideration of the facts they come clearly to the opinion that the question ought to be answered against the plaintiff, they must find for the defendant. Then comes this difficulty—suppose that the jury, after considering the evidence, are left in real doubt as to which way they are to answer the question put to them on behalf of the plaintiff: in that case also the burden of proof lies upon the plaintiff, and if the defendant has been able by the additional facts which he

has adduced to bring the minds of the whole jury to a real state of doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him. Cave, J., told the jury that the burden of proof lay upon the plaintiff, and I think that the effect of his summing up as to this point may be stated as follows: "Take the evidence before you; if your minds are made up one way or the other, there will be no difficulty; but if after consideration you remain in doubt how the questions which I put to you ought to be answered, I tell you that the burden of proof lies upon the plaintiff, and if either the plaintiff's evidence or the defendants' evidence added to the plaintiff's has really left you in doubt, the plaintiff has failed to satisfy the burden of proof which lies upon him." It is said that the expression "burden of proof" is capable of improvement: I do not doubt that it may be improved, but whoever attempts to improve it before a jury, will be trying a dangerous experiment. It is a form of expression which has been used over and over again, it is a form of expression which is known to the class of persons from whom jurors are drawn, and which, explained as Cave, J., did explain it, is well understood by them; and although a more accurate expression might be found, there would be by extreme accuracy danger of puzzling inaccurate minds. In my opinion it is better to continue to use this expression. It is no mis-direction not to tell the jury everything which might have been told them: there is no mis-direction, unless the judge has told them something wrong, or unless what he has told them would make wrong that which he has left them to understand. Non-direction merely is not mis-direction, and those who allege mis-direction must shew that something wrong was said or that something was said which would make wrong that which was left to be understood. In the present case I can see nothing but what was accurate and proper to give as a direction to the jury.

As to the appeal by the plaintiff from the judgment of Cave, J., it has been argued that even although the defendants took reasonable care to get at the truth of the case, nevertheless there was not reasonable and probable cause for instituting a prosecution of the plaintiff, and this question was wrongly decided by the judge. With regard to this point, I trust that nothing which I shall say,

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will be supposed to suggest anything derogatory of the plaintiff's character. The case against him was tried before a jury who acquitted him of the charge of conspiracy, and said that they thought that there was no blemish upon his character. I desire to say nothing which can at all derogate from the acquittal of the plaintiff by the jury who tried him. But he is not satisfied to stand with his character absolutely and entirely cleared, he comes before a jury with this action which is of a peculiar nature. As I have already intimated, it is not an action which the plaintiff can support merely upon the ground that he was entirely innocent; he must shew that the prosecution was instituted without reasonable and probable cause and with malice. The judge had to consider whether the defendants had reasonable and probable cause if the jury should find that the defendants, in prosecuting the plaintiff, had taken reasonable care to inform themselves of the true state of the case, and that they honestly believed the case which they laid before the magistrates. There were the statements of certain persons, which if they were true shewed clearly a conspiracy. It has been urged that these statements were tainted evidence, because they came from accomplices; the answer is that if there was a conspiracy, it must be proved by persons who were behind the scenes. Further, there was the evidence of doctors of the highest skill, in whom the directors of the defendant company might well trust, that the case of McMann was a sham, and the wounds upon him were produced by improper means. I cannot doubt that the judge was right in holding upon these facts and upon the findings of the jury that there was ample, reasonable and probable cause for the defendants to institute the prosecution. The directors acted like reasonable men. It may be that it is improper in men belonging to the medical profession to act as detectives and to employ detectives on behalf of railway companies. I think it wrong, but it is equally wrong in a medical man, even although he has no fraudulent intention, to get up cases for damages against railway companies. I think conduct of that kind most unbecoming: the only duty of medical men is to endeavour to cure their patients of injuries and diseases. But however that may be, the directors did not rest contented with the investigations of Rayne and the

detectives: they caused a solicitor to be employed, the statements of witnesses to be procured, and the opinion of counsel to be taken. It is impossible to say that the defendants' directors did not take reasonable care, and that they had no reasonable or probable cause.

For these reasons I differ from the decision of the Queen's Bench Division upon the question whether a new trial should be granted, and I think that the appeal from the order for a new trial must be allowed. I think that the appeal by the plaintiff from the judgment of Cave, J., must be dismissed.

BOWEN, L.J. I should be better pleased to leave the judgment of the Master of the Rolls without any addition of my own, and if I were to consult my own convenience I should do so, especially for this reason, that although it is not difficult to come to a true view of the law, this is a case in which the expression of the law becomes peculiarly difficult; but the case is important to the parties, and the judgment of the Queen's Bench Division was contrary to ours, and the case has been well argued, and I think that it would not be right to shrink from the burden of stating my own view of the case and of pointing out the weak places in the argument addressed to us.

This action is for malicious prosecution, and in an action for malicious prosecution the plaintiff has to prove, first, that he was innocent and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, or, as it may be otherwise stated, that the circumstances of the case were such as to be in the eyes of the judge inconsistent with the existence of reasonable and probable cause; and, lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice. All those three propositions the plaintiff has to make out, and if any step is necessary to make out any one of those three propositions, the burden of making good that step rests upon the plaintiff. I think that the whole of the fallacy of the argument addressed to us, lies in a misconception of what the learned judge really did say at the trial, and in a misconcep-

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tion of the sense in which the term "burden of proof" was used by him. Whenever litigation exists, somebody must go on with it; the plaintiff is the first to begin; if he does nothing, he fails; if he makes a primâ facie case, and nothing is done to answer it, the defendant fails. The test, therefore, as to the burden of proof or onus of proof, whichever term is used, is simply this: to ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the onus of proof shifts, and at which the tribunal will have to say that if the case stops there, it must be decided in a particular manner. The test being such as I have stated, it is not a burden that goes on for ever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side, and the burden rolls over until again there is evidence which once more turns the scale. That being so, the question of onus of proof is only a rule for deciding on whom the obligation of going further, if he wishes to win, rests. It is not a rule to enable the jury to decide on the value of conflicting evidence. So soon as a conflict of evidence arises, it ceases to be a question of onus of proof. There is another point which must be cleared in order to make plain what I am about to say. As causes are tried, the term "onus of proof" may be used in more ways than one. Sometimes when a cause is tried the jury is left to find generally for either the plaintiff or the defendant, and it is in such a case essential that the judge should tell the jury on whom the burden of making out the case rests, and when and at what period it shifts. Issues again may be left to the jury upon which they are to find generally for the plaintiff or the defendant, and they ought to be told on whom the burden of proof rests; and indeed it is to be observed that very often the burden of proof will be shifted within the scope of a particular issue by presumptions of law which have to be explained to the jury. But there is another way of conducting a trial at Nisi Prius, which is by asking certain definite questions of the

jury. If there is a conflict of evidence as to these questions, it is unnecessary, except for the purpose of making plain what the judge is doing, to explain to the jury about onus of proof, unless there are presumptions of law, such as, for instance, the presumption of consideration for a bill of exchange, or a presumption of consideration for a deed. And if the jury is asked by the judge a plain question, as, for instance, whether they believe or disbelieve the principal witness called for the plaintiff, it is unnecessary to explain to them about the onus of proof, because the only answer which they have to give is Yes or No, or else they cannot tell what to say. If the jury cannot make up their minds upon a question of that kind, it is for the judge to say which party is entitled to the verdict. I do not forget that there are canons which are useful to a judge in commenting upon evidence and rules for determining the weight of conflicting evidence; but they are not the same as onus of proof. Now in an action for malicious prosecution the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that a judge can see no reasonable or probable cause for instituting it. In one sense that is the assertion of a negative, and we have been pressed with the proposition that when a negative is to be made out the onus of proof shifts. That is not so. If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff. The terms "negative" and "affirmative" are after all relative and not absolute. In dealing with a question of negligence, that term may be considered either as negative or affirmative according to the definition adopted in measuring the duty which is neglected. Wherever a person asserts affirmatively as part of his case that a certain state of facts is present or is absent, or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively. It has been said that an exception exists in those cases where the facts lie peculiarly within the knowledge of the opposite party. The counsel for the plaintiff have not gone the length of contending that in all those cases the onus shifts, and that the person within whose knowledge the truth peculiarly lies is bound to prove or disprove the matter in dispute. I think a

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proposition of that kind cannot be maintained, and that the exceptions supposed to be found amongst cases relating to the game laws may be explained on special grounds.

To come back to the question of the present trial, it is possible that the language of Cave, J., has been misunderstood; and we must look and see out of the ways in which the question might possibly be tried, which way he has selected, because as soon as it is seen which mode of trial he has selected a great advance is made towards seeing that the criticisms which have been made on his direction are unsound. A judge may leave the jury to find a general verdict, explaining to the jury what the disputed facts are, telling them that if they find the disputed facts in favour of one side or the other, his opinion as to reasonable and probable cause will differ accordingly, telling them what, in each alternative, his view will be, and enabling them to apply that statement with reference to the issue as to malice; that is a way which in a very simple kind of case may be adopted. But I think it necessary only to state as much as I have stated about it, to see that a very clear head and a very clear tongue will be required to conduct a complicated case to a general verdict in that way. Accordingly, judges have been in the habit of adopting a different course whenever there are circumstances of complication. A judge may accordingly do this; he may tell the jury what the issues or questions are, and at the same time inform them what will be the effect upon the verdict, which they will ultimately be asked to find, of the answers they give to the specific questions, leaving the jury both to answer the questions and then to find a verdict, after he has explained to them what result the answers to the questions will involve. That is the way in which Cave, J., really did try this case. There is a third way in which a judge may conduct the trial, by asking the jury specific questions, and not leaving it to them to find the verdict, but entering the judgment upon their findings himself. That is a third way, and that was not adopted in form by the learned judge, although it will be observed it differs only slightly in form from the second mode of procedure, which he, in fact, did adopt. Now, if the judge adopts the second method of procedure, it is obvious that he is putting specific questions to the jury with the intention, as

soon as they have answered the specific questions, to request them to go still further, and to find a general verdict one way or the other on such answers. It is obvious that it is not required in such a case to explain to them the meaning of onus of proof exactly in the same way as if he left them generally to find a verdict. In answering the specific questions, where there is conflict of evidence they do not require to be told where the onus of proof lies, provided the alternative is always left to them to say, "we do not think the materials enable us to answer this or that question." But still a judge trying the case would probably let the jury know, as intelligent persons, the result of what they were doing, and might easily explain to them so much of the law about onus of proof, as gave them an intelligent interest in their functions. I really do not think that Cave, J., did more than that.

When he came to address the jury, the whole of the case was before him. There were, in theory, two logical ways of treating it. The question whether there was want of reasonable and probable cause depended upon the materials which were in the possession of the prosecution at the time it was instituted, and also on the further point whether those materials were carefully collected and considered. Now there might be two views of the materials which were in the possession of the prosecution. It may be said that the materials were evidently untrustworthy, or that they were obviously trustworthy, according as the one view or the other is taken of the facts. The burden of shewing carefulness in the inquiry would be shifted according to the view of the facts adopted. If the materials were admittedly untrustworthy, that would be a strong reason for throwing on the defendants the burden of shewing that they, nevertheless, had been misled, after all their care, into relying upon worthless materials. If the materials were obviously trustworthy, they would be enough primâ facie to justify those who trusted to them. The view for the plaintiff is, as it seems to me, that as a matter of law Cave, J., ought to have assumed that the materials in the possession of the prosecutors at the time they instituted the prosecution were untrustworthy and suspicious, and that he ought to have directed the jury to go on and consider, as if it were an independent matter, whether the prosecution had so conducted themselves as

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to relieve themselves of this grave opprobrium of having acted upon worthless materials; in effect, that he ought to have left to them a specific issue whether the inquiry had been conducted reasonably and properly by the prosecution,—whether they had collected the information carefully. Now I think that would have been a mistake in law. The trustworthiness of the materials—I do not mean the legal inference to be drawn from them, but the worth of them—was a question of fact, not a question of law,—a question of fact depending on the view the jury took about the evidence, and it seems to me that Cave, J., would have been wrong in dividing into two parts the questions of fact, assuming one half necessarily to be decided one way and telling the jury that the onus of proof shifted about the other. He put the two together, and asked the jury a question, I think, covering the whole of the controversy, whether the defendants took reasonable care to inform themselves of the true state of the case, not whether they took reasonable care to collect the materials in their possession, but whether they took reasonable care to inform themselves of the true state of the case. He then told the jury that they must bear in mind that it lay on the plaintiff to prove that the railway company did not take reasonable care to inform themselves of the true state of the facts. The meaning of that is, that if the jury were not satisfied whether the defendants did or did not take proper care—inasmuch as the plaintiff was bound to satisfy the jury that the defendants had not taken due care—the defendants would in the end be entitled to the verdict. That direction was quite correct. The judge did not direct the jury to keep their minds in a particular attitude of distrust towards the plaintiff's testimony in considering a limited portion of the investigation, the burden of maintaining which the defendants took upon themselves; but he informed the jury what would be the true result of the whole case, namely, that the burden of proving a want of reasonable and probable cause would rest on the plaintiff. He did not say that they were to approach every part of the inquiry as to each isolated fact with minds biassed in favour of the defendants. He left certain questions to the jury; but he did not direct them that in discussing amongst themselves the subordinate facts of the case they were to approach

the inquiry in a spirit of hostility to the plaintiff's evidence. The counsel for the plaintiff contend that the onus lay on the defendants for this reason. They say: the plaintiff had been shewn to be innocent, the circumstances under which he was called upon to attend his patient were obviously consistent with innocence, even if McMann was guilty of imposture, and, apart from any particular proposition, innocence, under these circumstances, will be evidence of want of reasonable and probable cause. That was the contention. The plaintiff's counsel thus insisted upon drawing a line half down their own case. The whole case was made up of a quantity of facts, and if one group of facts was treated in the sense most favourable to the plaintiff, no doubt it would have established a strong case against the defendants which they ought to answer by proving, if they can, another group of facts. But the plaintiff's counsel had no right to divide their case in that manner, and to assume that one inference is to be drawn from half their facts, which throws an additional burden upon the defendants with regard to the other half. That is the real vice in their argument. It is contended that the defendants ought to have known that the witnesses against the plaintiff were persons of bad character. But this is a matter which affects the weight of their evidence and not the onus of proof. It may be that it was a proper argument to be addressed to the jury, to ask them to find that, even if all these stories had been told to the defendants, still they were told by persons whom the defendants ought not to have accepted; that was a perfectly fair argument to address to the jury; but it was an argument on a matter of fact, and not on a matter of law, and the plaintiff's counsel had no right to ask the learned judge to tell the jury to assume that a limited portion of the facts in evidence, as a matter of law, established a case against the defendants, which the defendants had to answer by setting up some special case of their own. To do that would be to attempt to make the onus of proof shift in the middle of a conflict of evidence, whereas, as I explained when I began my judgment, the onus of proof is not a matter which enables a jury to decide between conflicting witnesses; and when there is evidence on which reasonable men may act one way or the other, to ask the

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learned judge to lay down such a rule as to shift the onus of proof in the middle of the case, would be to ask him to misdirect the jury; but the learned judge, so far from misdirecting the jury by adopting that view, directed the jury quite rightly.

Something has been said about innocence being proof, primâ facie, of want of reasonable and probable cause. I do not think it is. When mere innocence wears that aspect, it is because the fact of innocence involves with it other circumstances which shew that there was the want of reasonable and probable cause; as, for example, when the prosecutor must know whether the story which he is telling against the man whom he is prosecuting, is false or true. In such a case, if the accused is innocent, it follows that the prosecutor must be telling a falsehood, and there must be want of reasonable and probable cause. Or if the circumstances proved are such that the prosecutor must know whether the accused is guilty or innocent, if he exercises reasonable care, it is only an identical proposition to infer that if the accused is innocent there must have been a want of reasonable and proper care. Except in cases of that kind, it never is true that mere innocence is proof of want of reasonable and probable cause. It must be innocence accompanied by such circumstances as raise the presumption that there was a want of reasonable and probable cause. The ground of our decision comes back to what was suggested. Who had to make good their point as to the proposition whether the defendants had taken reasonable and proper care to inform themselves of the true state of the case? The defendants were not bound to make good anything. It was the plaintiff's duty to shew the absence of reasonable care; and it is, I think, because the Court below has been drawn, if I may use the expression, into thinking that what Cave, J., was really leaving to the jury was an issue upon a subordinate fact, that I respectfully differ from their view. With regard to the plaintiff's appeal from the judgment, I agree with what the Master of the Rolls has said.

FRY, L.J. I can in a few words express my opinion, which agrees with that of my learned brethren. The proposition which most commends itself to me on the part of the plaintiff is, that

where on the evidence given one party must win, then the burden of proving any new or independent facts is on the other party. It has been said that such was the condition of the case in this instance, and that the inquiry directed by the learned judge with regard to the care taken by the defendants was an inquiry with regard to a new fact without which the defendants could not succeed. That appears to me to be an entire misapprehension of the state of the case at the time when the learned judge was summing up the case. On the evidence given by the plaintiff alone, it appears to me far from clear that he could have won. On the contrary, it appears to me that on the whole of the evidence given by the plaintiff, as matters then stood, he must have failed, and therefore the burden of proving the new facts must rest upon the person who required them; that was on the plaintiff. Not even the respect which I feel for the judgment of the Court below can render it necessary in my judgment, that I should say any more in this case than I have already said, except to add that I entirely agree with the judgments which have been delivered by my learned brethren. Everything which I intended to say has been said by the one or the other of them.

Appeal from the judgment of the Queen's Bench Division allowed, and appeal from the judgment of Cave, J., dismissed.

Solicitor for plaintiff: *J. Balfour Allan, for W. M. Skinner, Sunderland.*

Solicitors for defendants: *Williamson, Hill, & Co., for George S. Gibb, York.*

J. E. H.

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April 7.

[IN THE COURT OF APPEAL.]

McGOWAN AND ANOTHER *v.* MIDDLETON.

Practice—Pleading—Discontinuance of Action—Counter-claim—Rules of Court, 1875, *Order XIX., rule* 3; *Order XXIII., rule* 1.

By discontinuing an action after a counter-claim has been delivered, a plaintiff cannot put an end to it so as to prevent the defendant from enforcing against him the causes of action contained in the counter-claim.

Vavasseur v. *Krupp* (15 Ch. D. 474) overruled.

In this action a counter-claim had been delivered by the defendant claiming a larger amount than that sued for by the plaintiffs, who afterwards and in due time, and without taking any further step, discontinued the action. The defendant then moved in the Queen's Bench Division for judgment upon the counter-claim under Rules of Court, 1875, Order XL., rule 11. Hawkins, J., refused to order judgment to be signed for the defendant on the counter-claim, Stephen, J., dissenting. The defendant appealed.

April 4, 7. *Ambrose, Q.C.*, and *Henry*, for the defendant. In this case the short point is whether the discontinuance of the action contains in itself also the discontinuance of the counter-claim. In the Queen's Bench Division reliance was placed upon the decision of Jessel, M.R., in *Vavasseur* v. *Krupp* (1). No doubt that is an authority directly in point for the plaintiffs, for it was held that a counter-claim is not an independent action; but the point does not appear to have been argued by counsel. In *Winterfield* v. *Bradnum* (2) it was said by Brett, L.J., that a claim and a counter-claim "are wholly independent suits which, for convenience of procedure, are combined in one action."

[Brett, M.R. My remarks in that case were directed to the question whether security for costs should be given. A counter-claim is not commenced by writ of summons, and this circumstance seems to shew that it is not an action: Order II., rule 1.]

The object of the writ of summons is merely to bring the

(1) 15 Ch. D. 474.

(2) 3 Q. B. D. 324, at p. 326.

defendant before the Court: it has no other use. A defendant may by counter-claim sue any party to the action: Order XXII., rule 5; and the effect of that rule is explained in *Turner* v. *Hednesford Gas Co.* (1) A counter-claim is not a defence; the plaintiff must plead to it as a defendant must plead to a statement of claim; for it is an independent suit: *Stooke* v. *Taylor*. (2)

[BRETT, M.R. The question is whether a counterclaim can operate as an independent action after the original action has ceased.]

In *Beddall* v. *Maitland* (3) doubts were expressed by Fry, L.J., whether the decision in *Vavasseur* v. *Krupp* (4) was correct. Jessel, M.R., in *Original Hartlepool Collieries Co.* v. *Gibb* (5), went so far as to hold that damages claimed by a counter-claim must be limited to the date, when the writ in the original action was issued. But Fry, J., in *Beddall* v. *Maitland* (3), dissented from this view, and declined to follow the opinion of Jessel, M.R. If a counter-claim is extinguished by a discontinuance, the plaintiff may in some cases wait until the defendant's claim has been barred by the Statute of Limitations, and by then discontinuing the action may prevent the defendant from recovering in a fresh action. In *Andrew* v. *Aitken* (6) it was argued that a counter-claim is really an independent action, and Fry, J., stated that he thought the argument right on principle.

[BOWEN, L.J. An objection to the argument for the defendant is, that although his claim against the plaintiffs becomes final by the judgment, nevertheless their claim does not come to an end; for notwithstanding the discontinuance the plaintiffs may bring a fresh action in respect of it: Order XXIII., rule 1.]

It was not intended to allow a plaintiff to discontinue, when a counter-claim has been pleaded. Order XXIII. applies only to a discontinuance before or after the delivery of the statement of defence; and a counter-claim is not a "defence" to the action.

Crompton, Q.C., and *Herbert Reed*, for the plaintiffs. By the discontinuance the whole of the proceedings have come to an end; the claim and the counter-claim are both dead. Lush, L.J.,

(1) 3 Ex. D. 145.
(2) 5 Q. B. D. 569.
(3) 17 Ch. D. 174.
(4) 15 Ch. D. 474.
(5) 5 Ch. D. 713.
(6) 21 Ch. D. 175.

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in *Gathercole* v. *Smith* (1), approved of *Vavasseur* v. *Krupp*. (2) A counter-claim is merely a defence, and if the facts supporting it arose after action brought, it must be framed so as to shew this circumstance: *Ellis* v. *Munson*. (3)

[BRETT, M.R. That case does not help us.]

A person named in a defence as a party to a counter-claim thereby made cannot counter-claim against the defendant: *Street* v. *Gover*. (4)

[BRETT, M.R. Suppose that the counter-claim is ordered by the Court to be tried separately, and that the plaintiff then discontinues.]

Even in that case the result would be the same as in the present, but the plaintiff could not discontinue without leave. It must be admitted that, according to the argument for the plaintiffs, whenever the defendant's counter-claim is nearly barred by the Statute of Limitations, the plaintiff may wait until that statute begins to operate, and he then may discontinue, and thus prevent the defendant from enforcing his rights; but this inconvenience may always be avoided, if the defendant takes the precaution of issuing a writ of summons against the plaintiff at the time of delivering the counter-claim. A plaintiff may, in his reply to a counter-claim of the defendant, counter-claim in respect of a cause of action accrued after the issue of the writ, but arising at the same time and out of the same transaction as the counter-claim of the defendant: *Toke* v. *Andrews*. (5) A defendant cannot be ordered to give security for the plaintiff's costs occasioned by a counter-claim, even although he is a foreigner residing abroad, for the counter-claim is only a defence: *Mapleson* v. *Masini*. (6) The present application is no doubt grounded upon the decision of the Queen's Bench Division in *Lumsden* v. *Winter* (7); but the judges expressed grave doubts whether the procedure was proper. This Court is at liberty to disregard the authority of that case, if it thinks that the decision ought not to be followed. A counter-claim is like a cross-bill under the former practice in

(1) 7 Q. B. D. 626, at p. 629.
(2) 15 Ch. D. 474.
(3) 35 L. T. (N.S.) 585.
(4) 2 Q. B. D. 498.
(5) 8 Q. B. D. 428.
(6) 5 Q. B. D. 144.
(7) 8 Q. B. D. 650.

equity, which fell with the original bill. The plaintiffs ought not to be compelled to go on if they are not ready: they are willing to pay the defendant's costs.

Ambrose, Q.C., in reply. A counter-claim is a cross-action, or, at all events, must be treated as such.

BRETT, M.R. This action having been brought to recover a sum of money, the defendant set up by way of answer to the plaintiffs' claim what is called a counter-claim; that is to say, he delivered a pleading which may be considered either a set-off, or what is more properly deemed to be a counter-claim, the defendant's claim being for a larger amount than the plaintiffs' claim. Within due time, and without taking any further step, the plaintiffs discontinued the action. The defendant waited until the expiration of the time within which the plaintiffs ought to have delivered a reply, if the action had proceeded, and he then applied to the Queen's Bench Division for judgment under Order XL., rule 11, on the ground that the plaintiffs by not delivering a reply had admitted the defendant's claim. In that Court a difference of opinion appears to have arisen, Hawkins, J., acting on *Vavasseur* v. *Krupp* (1), and holding that leave ought not to be given to the defendant to enter judgment upon the counter-claim, and Stephen, J., being of a different opinion; Hawkins, J., in effect held that by the discontinuance of the action the counter-claim had ceased to exist. In this Court it has been argued on behalf of the plaintiffs that the view of Hawkins, J., is right, and that a counter-claim is only a defence to the plaintiffs' claim, and is not a cross-action, and therefore, that when the action is discontinued the counter-claim also falls to the ground. For the defendant it has been contended that a counter-claim is, in truth, a cross-action; but at all events, if it is not a cross-action, it is to be treated as if it were a cross-action, and that the discontinuance of the action by the plaintiffs does not put an end to the defendant's right in respect of the counter-claim. For the plaintiffs reliance has been placed upon *Vavasseur* v. *Krupp* (1), and if that decision be right, it will support the contention for them; and therefore if we decide for the defendant,

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we must overrule *Vavasseur* v. *Krupp* (1). It was a decision by Sir George Jessel, my immediate predecessor as Master of the Rolls: we are bound to pay the highest respect to the opinion of so great a judge; but other judges have proceeded on contrary grounds and have come to a different conclusion: we must therefore decide which of the two conflicting views is correct.

The first point to be considered is whether a counter-claim is a cross-action; if it is a cross-action, it cannot be put an end to by a discontinuance of the plaintiff's claim: in old times, that is, before the Judicature Acts, discontinuance of an action was not discontinuance of a cross-action. But I think that a counter-claim is not a cross-action; it cannot be deemed an action, it not being commenced by writ of summons. But a counter-claim must be treated as if it were a proceeding in a cross-action. The great object of the Court of Appeal has been to make litigation as short, as cheap, and as safe for the suitors as is practicable. When first I sat as a judge in the Court of Appeal, it was often presided over by James, L.J., one of the greatest of judges: I have never met with a judge of larger mind or more inclined to break down technicalities of equity as well as of law; and he acted on the principle that under the Judicature Acts, when litigation should arise, all matters in dispute should be brought before the Court. The fundamental idea of the framers of those statutes is to be found in the Judicature Act, 1873, sect. 24, sub-s. 7, which enacts that the High Court of Justice and the Court of Appeal shall grant all such remedies as any of the parties may appear to be entitled to in respect of any legal or equitable claim; "so that, so far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any such matters avoided." Every endeavour has been made to carry out this principle, and all the judges have tried to bring litigation to an end as speedily as possible. This principle was acted upon, not only by James, L.J., but also by Jessel, M.R., himself, who had much the same mind as James, L.J., and like him, was determined to sweep away every kind of technicality. It is proper to apply the principle of the enactment which I have mentioned to the present

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case. The defendant has set up by counter-claim a wholly distinct cause of action from that of the plaintiffs; and the successful party, whichever succeeds, may issue execution for the balance found to be due to them. For the plaintiffs, it is contended that within a limited time they may from caprice or any other motive put an end to the action; but surely it is more reasonable that the defendant should be at liberty to go on with his claim against the plaintiffs. I have come to the conclusion that *Vavasseur* v. *Krupp* (1) cannot be followed; it was decided without the orders and rules under the Judicature Acts being brought before the Master of the Rolls, and the question does not seem to have met with much consideration. The decision has been questioned before Fry, J., in *Beddall* v. *Maitland* (2), who really differed from Jessel, M.R. I agree with the view of Fry, J., and with his decision, and I venture to think that the judgment in *Vavasseur* v. *Krupp* (1) is wrong. The Courts appear to have leaned to the view of Fry, J., and it seems to me to have been thought that every thing done in the course of the proceedings upon the counter-claim must be treated as if it had been part of the proceedings in a cross-action, and the allocatur must be given as it is given in one action; thus it has been held that a claim and a counter-claim form but one action, but the counter-claim is to be treated as if it were a cross-action.

I will now refer to the orders and rules bearing upon the subject. By the Judicature Act, 1873, s. 24, sub-s. 3, power is given to the High Court and to the Court of Appeal to grant to any defendant in respect of as well equitable as legal rights "all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner." This enactment provides that in every action the defendant shall be entitled to enforce against the plaintiff all kinds of legal and equitable rights, in fact, all such rights as the defendant would have been able to enforce if he had brought an action against the plaintiff. By Order XIX., rule 3, "a defendant in an action may set off, or set up by way of counter-

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claim, against the claims of the plaintiff any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim." In this rule the action, in which a counter-claim has been set up, is treated as the plaintiff's action; but the defendant may enforce any right or claim which he may have by way of set-off or counter-claim: nevertheless, the claim and the counter-claim are to be treated as one action, and it is plain from the very language of the rule that the counter-claim is not merely a cross action. The Court is enabled to pronounce a final judgment in the same action, both on the original and the cross claim; there is only one execution, and that is in favour of the party who is found to be entitled to the balance. It is true that there are two taxations of costs, and in this respect a claim and a counter-claim are like two independent actions; but only the difference of amount between the two sets of costs is granted by the allocatur. It seems to me that claims and counter-claims have been dealt with in this manner: they have been treated as independent suits, but the action is nevertheless one action. The practice as to discontinuance is now governed by Order XXIII., rule 1; the phraseology of that rule is varied; it first provides that the plaintiff may discontinue "his action," and afterwards it speaks of "the action." But the rule does not give power to deal with the defendant's cause of action; "the action" must mean the same as "his action," that is to say, the action which the plaintiff has power to discontinue, and he can only discontinue what is his own. The plaintiff's action being discontinued, that which is only a defence to it drops with it; but anything beyond a defence, anything in the nature of a claim against the plaintiff, must be treated separately and cannot be discontinued. If the defendant's claim against the plaintiff can be treated both as a set-off and as a counter-claim, the defendant is not bound to treat it as a set-off; the discontinuance will not prevent him from dealing with it as if it were a cross action, and therefore the counter-claim still remains in existence. The plaintiff has a right to plead to it anything which would be a defence to a cross action;

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the old doctrine of departure in pleading is gone, and the plaintiff may plead by way of defence to the counter-claim the facts averred in the claim which he has discontinued; but he must do that within a limited time, and if he does not deliver a pleading within a proper time, the defendant has a right to ask for judgment. As I understand, in the present case the defendant has taken this course; he has suggested that the plaintiffs were bound to plead to the counter-claim, and he has claimed judgment for want of a pleading. The plaintiffs object that owing to the discontinuance the counter-claim is gone; it seems to me that if this Court were to encourage that contention, we should be committing a breach of the fundamental principle of the Judicature Acts. I think that nothing can be found to justify the contention for the plaintiffs. It has been contended that under the former practice in equity a cross-bill fell with the bill, and therefore that a counter-claim must fall with the claim; even if this be a true statement of the practice observed in the Court of Chancery, it will not apply to the present case; for a cross-bill was different from a counter-claim, inasmuch as it dealt only with the same matter as the original bill. But I have consulted those who have had more experience in equity than I have, and I am told that it is not clear that the dismissal of a bill by the plaintiff would dismiss also the cross-bill. The truth is that the system introduced by the Judicature Acts stands between the former systems of Equity and Common Law and resembles that of the Court of Admiralty; in that Court two actions arising out of the same matter might be treated like cross actions and tried together.

If this argument for the plaintiffs were right, they might draw on the defendant to rely upon obtaining redress by means of a counter-claim, and then by discontinuing their own action and by pleading the Statute of Limitations to any action brought by him might deprive him of the rights set up by him in the counter-claim. This objection is imperfectly met by the suggestion that the defendant at the time of delivering a counter-claim may issue a writ in a cross action, and thereby defeat the plaintiffs' defence of the Statute of Limitations. Then it was argued that it was hard that the plaintiffs should be compelled to go on and meet the allegations of the counter-claim, when they are not ready to

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do so; but this is a difficulty which may be surmounted, the plaintiffs may apply for further time.

In the result I cannot agree with the decision in *Vavasseur* v. *Krupp* (1), and I agree with the view of Fry, J., in *Beddall* v. *Maitland* (2). Therefore I think that the counter-claim gave the same rights against the plaintiffs as a cross action would have done, and that the discontinuance had no effect upon it. Our judgment must be in favour of the appeal, but the plaintiffs will be allowed to withdraw their notice of discontinuance; they may admit that they cannot support their statement of claim, or they may take such other steps as they may think fit; they must act as they may be advised. The plaintiffs acted on the authority of *Vavasseur* v. *Krupp* (1), and in the Queen's Bench Division they had a right to rely upon it; therefore the costs, except the costs of the appeal, will be costs in the cause; the appellant must have the costs of the appeal, because when notice of appeal is given, a respondent must make up his mind whether he ought to stand by the decision in his favour.

BOWEN, L.J. The plaintiffs have brought an action to recover money from the defendant, and he has set up an independent claim overtopping that of the plaintiffs. The plaintiffs have discontinued their action, and are ready to pay all the costs; the question is whether the plaintiffs can compel the defendant to drop the independent counter-claim. The late Master of the Rolls in *Vavasseur* v. *Krupp* (1) held that when an action is discontinued, the counter-claim is gone; his voice will not be the less respected now when it can be no longer heard; but this Court in now overruling *Vavasseur* v. *Krupp* (1) is disregarding a decision based on a mere technicality, and it seems to me is adopting broader views where we can tread firmly. In that case even Jessel, M.R., failed to appreciate the extent to which redress has been given by the Judicature Acts and the Orders and Rules. Before those statutes a defendant could not get cross-relief in the same action; and the legislature intended that all controversies existing between the parties should be swept away by one litigation. That is one of the cardinal principles of the Judicature

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Acts, and it is set forth in the Act of 1873, s. 24, sub-s. 7. After that provision was enacted, it became the duty of the Courts of Justice to bring about the final settlement of disputes. In the present case the defendant sets up a claim for independent relief, and the plaintiffs contend that after the discontinuance that independent relief must be obtained by issuing a writ of summons in an independent action. The defendant replies that it is not true to say that because the action brought by the plaintiff ceases, the counter-claim also ceases. In a case like this metaphor ought not to be used, and it is misleading to talk about an action "dying:" such terms give rise to error when they are applied to the exposition of legal principles. We must proceed upon the words of the Acts. By the Judicature Act, 1873, s. 24, sub-s. 3, the Courts have power to grant to a defendant any relief which is properly claimed by him against the plaintiff, and which might have been granted in a suit properly instituted by him for that purpose; by that enactment a defendant is permitted to set up a counter-claim. Have the rules as to discontinuance cut down the right of the defendant to have the point litigated which he wishes to be decided? So far as the machinery created by the Act goes I think not. In Order XIX. rule 3, provisions are contained which shew that a counter-claim is not merely a defence, but has the same effect as a statement of claim in a cross-action. It had never been the case before the Judicature Acts that discontinuance of an action had the effect of discontinuing a cross-action. It has been contended that in the rules as to pleading a counter-claim is treated as part of the statement of defence, and that it was not intended that a counter-claim should have further vitality when the plaintiff's claim has been discontinued. In answer to that argument I will refer to Order XXIII. The order provides that the plaintiff may "discontinue his action," but a counter-claim is not part of the plaintiff's action and cannot be so treated. But even if the words "his action" be read as "the action," the result is the same; a plaintiff can deal only with his own case. He cannot touch that to which legislation has given the effect of a statement of claim in a cross-action. The judgment in *Vavasseur* v. *Krupp* (1) must therefore be overruled. I think that the

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late Master of the Rolls failed to see the full force of the statutes. Suppose that a plaintiff does discontinue his action, and that the defendant goes on with his counter-claim; in reply to the counter-claim the plaintiff may repeat his original claim; is it a hardship that he should be compelled to do so if he wishes still to insist on it at any time thereafter? Suppose that the effect of our decision is to prevent a plaintiff from discontinuing whenever a counter-claim is pleaded, which the defendant desires to prosecute in any event; I cannot think that any hardship is inflicted upon him. I have felt some hesitation; but now I with confidence assent to the view of the present Master of the Rolls, and I am of opinion that a discontinuance does not put an end to the defendant's counter-claim.

Appeal allowed.

Solicitors for plaintiffs: *Lewty & Bendle, for Mason & Thompson, Whitehaven.*

Solicitors for defendant: *Helder, Roberts, & Gillett, for Edward Atter, Whitehaven.*

J. E. H.

June 22.

[IN THE COURT OF APPEAL.]

BATCHELOR *v.* FORTESCUE.

Negligence—Lord Campbell's Act (9 & 10 *Vict. c.* 93)*—Contributory Negligence —Licensee.*

The deceased was employed by a builder to watch and protect certain unfinished buildings. Workmen were employed by the defendant, a contractor, on the land near to where the deceased was on duty, to excavate the earth for the foundations of other buildings. In the performance of this operation they employed a steam-crane and winch to which were attached a chain and iron bucket by means of which the earth was raised from the excavation and thence to the carts which were to carry it away. The deceased had nothing to do with the excavations, but was standing where he need not have been, watching the defendant's men at work, and allowing the bucket to pass some three feet over his head, when the chain broke and the bucket and its contents falling upon him so injured him that he subsequently died:—

Held, that there was no evidence of negligence in the defendant's workmen; that the deceased was at the most a bare licensee; and that he stood where he did subject to all the risks incident to the position in which he had placed himself.

THIS was an action brought by the plaintiff, the widow of Henry Batchelor, to recover compensation under Lord Campbell's

Act, 9 & 10 Vict. c. 93, for negligence of the defendant's workmen which resulted in Batchelor's death.

At the trial before Lopes, J., a verdict was by the direction of the learned judge found for the defendant. A rule was afterwards obtained for a new trial on the ground of misdirection on the part of the learned judge in telling the jury that there was no evidence of negligence upon which the defendant could be charged.

The rule came on for argument in the last Hilary Sittings by *McIntyre, Q.C.*, and *Upjohn*, for the plaintiff, and *Grantham, Q.C.*, and *W. M. Goodman*, for the defendant.

The facts and arguments sufficiently appear in the judgment.

Cur. adv. vult.

April 30. The judgment of the Court (Williams and A. L. Smith, JJ.) was delivered by

A. L. SMITH, J. This case came on for trial before Lopes, J., and a common jury on the 12th of January last, when, at the close of the plaintiff's case, upon the application of the defendant's counsel, the learned judge directed a verdict for the defendant, with costs, and gave judgment accordingly.

A rule was subsequently obtained on behalf of the plaintiff calling upon the defendant to shew cause why the verdict and judgment should not be set aside and a new trial had, on the ground that the learned judge misdirected the jury in directing them that there was no evidence of the defendant's liability.

The action was brought under Lord Campbell's Act, 9 & 10 Vict. c. 93, to recover compensation for the death of Henry Batchelor. The facts of the case, as appears from the judge's notes, are as follows:—One King was possessed of a plot of land in Bethnal Green Road. On a portion of this land warehouses had been erected; and on the residue thereof excavations were being carried out by the defendant, who had contracted with King for the performance of the work. To carry out this operation, the defendant by his men worked a steam winch and crane

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with a chain and iron tub attached thereto; the winch and crane being placed upon the upper edge of the land which was immediately contiguous to the face of the earth which was being excavated.

The mode of working was as follows:—The iron tub was in the first place filled with earth weighing some 15 cwt. The steam winch then hoisted the tub up from where it was filled to the level of the ground surface. The crane then swung it round to where a cart was standing to receive the earth, and into it the contents of the tub were then emptied. By continuously repeating the above operation the excavations were carried on. The machinery used as aforesaid was the defendant's property. A plan produced upon the argument of the rule shewed clearly the position of the crane and the character of the work.

The evidence called on the part of the plaintiff proved that the deceased was employed by King to watch the materials and buildings belonging to King; that, on Good Friday (the day on which the accident happened), the deceased was watching the defendant's men at work; that the deceased had nothing to do with the excavating; that he need not have been where he was to watch the buildings and materials; and that he stood and allowed the iron tub with the earth in it to travel some three feet over his head, when the chain broke, and the tub and its contents fell upon the deceased's foot and injured him, from which injury he subsequently died.

It was conceded upon the argument of the rule that the deceased had nothing whatever to do with the defendant's men; nor was it any part of his duty to superintend or watch them at their work. The above was the whole of the evidence given on the part of the plaintiff material to the point in hand.

We are of opinion that there was no evidence given to shew that the plaintiff was other than a bare licensee (even if his case could be put as high as that, which was disputed,) upon the spot where he was at the time of the accident, and that he stood where he did subject to all the risks attending his being where he was: see per Bramwell, B., in *Holmes* v. *North Eastern Ry. Co.* (1), and

(1) Law Rep. 4 Ex. 254, 257.

that there was no duty cast upon the defendant to take due and reasonable care of him, as contended for by the plaintiff on the argument of the rule. The judgment of Willes, J., in *Indermaur* v. *Dames* (1) and the case of *Collis* v. *Selden* (2) shew what is the position of a bare licensee under circumstances similar to the present. The recent case of *Ivay* v. *Hedges* (3) is also very much to the point. In that case the plaintiff, a tenant of apartments, had a licence from his landlord to use if he liked a certain leaden roof to dry his clothes on. There was a defect in a rail which was situate upon this roof, and which defect was known to the landlord. The plaintiff went upon the roof for the purpose of removing some linen which was there, when his foot slipped, and, the rail being out of repair, he fell through to the court-yard below and was injured. It was held that, inasmuch as the plaintiff had a mere licence to use the roof if he wished, there was no duty upon the defendant to fence or keep the fence in repair.

It should be noticed that the cause of action alleged in the statement of claim is, that the defendant knowingly permitted a chain to be used when altogether unfit for use. Of this cause of action no evidence was adduced: but we consider that the statement of claim has been amended by alleging a duty on the defendant to take due care of the plaintiff, and averring a breach thereof. We are of opinion that no evidence was given to support such a cause of action.

As to the second point argued, viz. whether there was any evidence of negligence on the part of the defendant's servants, we think that, though slender, coupled with the admission in the pleadings that the chain was somewhat worn, it could not properly have been withdrawn from the jury; but, inasmuch as the plaintiff failed to establish by evidence a duty on the part of the defendant to take due and reasonable care of the deceased, in our judgment the learned judge did not misdirect the jury, and the verdict and judgment entered by him must stand, and this rule must be discharged with costs.

We may add, that, taking the view we do of this case, it is

(1) Law Rep. 1 C. P. 274; and see Law Rep. 2 C. P. 311.

(2) Law Rep. 3 C. P. 495.

(3) 9 Q. B. D. 80.

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unnecessary to consider whether the provisions of Order XXXIX., r. 3, (1) are applicable to it or not.

Rule discharged.

J. S.

The plaintiff appealed.

June 22. *McIntyre, Q.C.*, and *Upjohn*, for the plaintiff. The ruling of Lopes, J., was wrong in holding that there was no evidence of negligence to go to the jury.

[BRETT, M.R. The ruling of the judge at the trial seems to have proceeded upon the ground, that the deceased was not bound in the course of his employment to go to the excavations.]

That view would make the question one of contributory negligence: and whether the deceased had been guilty of contributory negligence, ought clearly to have been left to the jury. The defendant might reasonably suppose that some one would be employed by King to take care of his materials, and the defendant ought to have acted accordingly.

[BOWEN, L.J. I think that *Collis* v. *Selden* (2) and the decisions as to invitation are not in point; but what evidence is there that the defendant had reason to suppose that the deceased would be at the spot where he met his death?]

The defendant's servants ought to have seen the deceased before swinging round the crane. *Ivay* v. *Hedges* (3) is plainly distinguishable, because there no act was done by the defendant or his servants, which inflicted injury on the plaintiff, it was simply a case of omission. "Whenever, in doing an act otherwise lawful, a man unintentionally causes damage to another, which with ordinary care could have been foreseen and guarded against, he will generally speaking be liable to an action, provided such other person was injured in the exercise of a right

(1) "A new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the Court to which the application is made some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such court that such wrong or miscarriage affects part only of the matter in controversy, the Court may give final judgment as to part thereof, and direct a new trial as to the other part only."

(2) Law Rep. 3 C. P. 495.

(3) 9 Q. B. D. 80.

available against the world at large, or against the person guilty of the negligence:" Addison on Wrongs, ch. 1, s. 1, pp. 19, 26 [5th ed.]. This statement of the law applies in the present case.

W. M. Goodman (*Grantham, Q.C.*, with him), for the defendant, was not called upon to argue.

BRETT, M.R. There was no evidence to shew that the defendant's workmen had reason to expect the deceased to be at the spot where he met with his death. There was no contract between the defendant and the deceased: the defendant did not undertake with the deceased that his servants should not be guilty of negligence, no duty was cast upon the defendant to take care that the deceased should not go to a dangerous place. Lopes, J., was right in deciding against the plaintiff.

BOWEN and FRY, L.JJ., concurred.

Appeal dismissed.

Solicitor for plaintiff: *John Tucker.*
Solicitors for defendant: *G. & W. Webb.*

J. E. H.

THE QUEEN *v.* THE JUDGES AND JUSTICES OF THE CENTRAL CRIMINAL COURT.

Feb. 11.

Central Criminal Court a "Superior Court," against whom Mandamus will not lie—4 & 5 Wm. 4, c. 36.

Mandamus will not lie to the judges and justices of the Central Criminal Court.

The Recorder of London, upon the trial and conviction of a prisoner charged with larceny, having refused to order (under 24 & 25 Vict. c. 96, c. 100,) the person with whom the stolen property was pledged to restore it to the prosecutor,—the Queen's Bench Division refused to grant a mandamus directed to "the judges and justices of the Central Criminal Court," to compel the Recorder to make such order.

ONE Emma Frances Butler, who had been intrusted by Spencer Weeks, her employer, with cloth to make up into garments, pledged it with one Walker. For this larceny she was tried before the Recorder of London at the Central Criminal Court, and upon her

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own confession was convicted and sentenced. Application was then made by the counsel for the prosecution for an order upon the person with whom the cloth had been pledged, under 24 & 25 Vict. c. 96, s. 100, for the restitution of the cloth. The Recorder, however, refused the application, on the ground, as was suggested, that the prisoner might have been summarily convicted.

A rule having been obtained directed to the judges and justices of the Central Criminal Court, calling upon them to shew cause why a writ of mandamus should not issue commanding them to make the order prayed,

Sir F. Herschell, S.G. (*R. S. Wright* with him), shewed cause. The Central Criminal Court was established by 4 & 5 Wm. 4, c. 36. By s. 1 of that Act it is enacted that "the Lord Mayor for the time being of the city of London, the Lord Chancellor or Lord Keeper of the Great Seal, and all the judges for the time being of His Majesty's Courts of King's Bench, Common Pleas, and Exchequer, the chief judge and the two other judges in bankruptcy, the judge of the Admiralty, the Dean of the Arches, the aldermen of the city of London, the recorder, the common serjeant, the judges of the Sheriffs' Court of the city of London, for the time being, and any person or persons who hath or shall have been Lord Chancellor, Lord Keeper, or a judge of any of His Majesty's superior courts of Westminster, together with such others as His Majesty, his heirs and successors, shall from time to time name and appoint by any general commission as hereinafter stated, shall be and be taken to be the judges of a court to be called 'The Central Criminal Court,' to which His Majesty and his heirs and successors may direct his general commission as hereinafter mentioned; and which Court shall have jurisdiction to hear, try, and determine all offences committed or alleged to be committed as hereinafter specified." Sect. 2 provides that His Majesty may issue commissions of oyer and terminer to inquire of, hear, and determine all treasons, murders, felonies and misdemeanors committed within the city of London and county of Middlesex, and certain parts of Essex, Kent, and Surrey: and then it goes on to enact that "it shall be lawful for the justices and judges of the Central Criminal Court aforesaid, or any two

or more of them, to inquire of, hear, determine, and adjudge all such treasons, murders, felonies, and misdemeanors, and all treasons, murders, felonies, and misdemeanors which might be inquired of, heard, and determined under any commission of oyer and terminer for the city of London or county of Middlesex, or commission of gaol delivery to deliver the gaol of Newgate, or which, in case the parts of the counties of Essex, Kent, and Surrey respectively comprised within the limits aforesaid had been counties of themselves, might have been inquired of, heard, and determined under commissions of oyer and terminer and gaol delivery for such counties, and to deliver the said gaol of Newgate at such times and places in the said city or the suburbs thereof as by the said commissions shall be appointed, or as by the said justices and judges by virtue and in pursuance thereof, or any two or more of them, shall appoint; and to award and issue all precepts and process, and use and exercise all the powers and authorities belonging to justices of oyer and terminer and gaol delivery," &c. Sect. 16 provides that indictments found at the sessions of the peace for the cities of London and Westminster, the liberty of the Tower of London, the borough of Southwark, and the counties of Essex, Kent, and Surrey, or either of them, may be removed by certiorari before justices of oyer and terminer and gaol delivery. And by s. 19 it is further provided that the justices of the places named in s. 16 "may certify, transmit, and deliver to the judges and justices of oyer and terminer and gaol delivery indictments found or taken before them at their respective general or quarter sessions of the peace or at any adjournment thereof, for any offence or offences cognizable by the said justices and judges of oyer and terminer and gaol delivery by virtue of this Act, in the same manner to all intents and purposes as the said justices of the peace might or could do if the said Court of oyer and terminer and gaol delivery was holden in the county where such indictments or presentments were found or taken."

[POLLOCK, B. The Central Criminal Court is at least as high a Court as the Court of Assize.]

If a mandamus will lie in this case it will equally lie to every Court of oyer and terminer and gaol delivery in the kingdom.

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This matter was discussed in *Ex parte Fernandez* (1), where it was held that the Court of Assize, being a "superior Court," the presiding judge had jurisdiction to commit a witness for contempt of Court in refusing to answer a question put to him, and that his decision was not subject to review by the Court above. The very elaborate judgment there delivered by Willes, J., contains all the law upon the subject. If, then, the Central Criminal Court is a "superior Court," which cannot be doubted, this Court has no power to issue a mandamus to compel that Court to do a thing which in its discretion it has not thought fit to do.

C. E. Jones, in support of the rule. Though for some purposes, no doubt, the Central Criminal Court is a superior Court, yet for the trial of a case of larceny, which this was, it is no higher than a court of quarter sessions. The Lord Mayor, the Aldermen, the Recorder, or the Common Serjeant, for instance, could not try a case of treason or murder.

[POLLOCK, B. By s. 2 of the Act which constitutes the Court in question it is provided that the said judges and justices, of whom the Lord Mayor is the head, or any two or more of them, are to hear and determine all treasons, murders, and felonies, &c.]

The case relied on, *Ex parte Fernandez* (1), was tried on circuit in the Court of Assize, which no doubt is a superior Court to all intents and purposes. The act which the recorder was asked to do was one of a purely ministerial character, and one which he was bound to do. (2) Prohibitions have gone to the Court of Admiralty, the judge of which is a justice or judge of the Central Criminal Court, and to the Court of Arches, both of which are superior Courts; and why not a mandamus to the Central Criminal Court?

POLLOCK, B. In this case a rule nisi was granted calling upon the judges and justices of the Central Criminal Court to shew cause why a writ of mandamus should not issue, commanding them to make an order for the restitution of certain goods which had been stolen by a woman who was tried before the Recorder of London and convicted upon her own confession. I cannot help thinking that this motion was made upon a notion that the duties

(1) 10 C. B. (N.S.) 3; 30 L. J. (C.P.) 321. (2) See 24 & 25 Vict. c. 96, s. 100.

7 Jurist. 571

of the judges and justices of the Central Criminal Court are divisible, that is to say, that certain graver classes of offences, such as treason, murder, and felony, which are usually tried before some one or more of Her Majesty's judges, are cases tried before the Central Criminal Court as a superior Court, while offences of an inferior degree are tried before the recorder and commissioners as justices of sessions. If that could have been shewn to be so, a better foundation would have been laid for the argument which has been presented to us. But, upon reference to 4 & 5 Wm. 4, c. 36, the Act by which the Central Criminal Court was created, it clearly appears that that is not so. Originally certain justices of the city of London sat from time to time to dispose of offences of a lesser degree at the Old Bailey. It being thought convenient that prisoners charged with offences of a graver character committed in the city and in the county of Middlesex should be tried there, commissions were from time to time issued by the Crown to those justices and to the judges of the Courts of Queen's Bench, Common Pleas, and Exchequer, and also to the judge of the Admiralty Court because cases of piracy and other crimes committed on the high seas could be most conveniently tried there. In 1834 was passed the Act under which the Central Criminal Court now sits. By s. 1 it was enacted that the Lord Mayor for the time being of the city of London, the Lord Chancellor or Lord Keeper of the Great Seal, and all the judges for the time being of His Majesty's Courts of King's Bench, Common Pleas, and Exchequer, the judges of the then Court of Bankruptcy, the judge of the Admiralty, the Dean of the Arches, the aldermen of the city of London, the recorder, the common serjeant, the judges of the then Sheriffs' Court of the city of London, for the time being, and any person or persons who hath or shall have been Lord Chancellor, Lord Keeper, or a judge of any of His Majesty's superior Courts of Westminster, together with such others as His Majesty, his heirs, &c., shall from time to time appoint by any general commission as thereinafter stated, shall be and be taken to be the judges of a Court to be called the Central Criminal Court, to which His Majesty and his heirs and successors may direct his general commission as thereinafter mentioned; and which Court shall have jurisdiction to hear, try,

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and determine all offences committed or alleged to be committed as thereinafter specified. Sect. 2 prescribes the area over which the jurisdiction of the Court was to extend, and impowers "the justices and judges of the Central Criminal Court aforesaid, *or any two or more of them*," to inquire of, hear, determine, and adjudge all such treasons, murders, felonies, and misdemeanors which might be inquired of, heard, and determined under any commission of oyer and terminer within those limits. I find nothing in the Act to shew that, when the Central Criminal Court sits to try cases of treason or murder it sits in any other capacity than if it sits for the trial of any ordinary crime. It seems to me, therefore, that the Court before whom the prisoner in the present case was tried was sitting as a superior Court, of at least as high authority as justices of assize sitting under a commission of oyer and terminer and gaol delivery on circuit. There being no precedent to be found of this Court,—the highest common law Court of criminal jurisdiction,—ever having issued a mandamus to a superior Court, which the Central Criminal Court clearly is, it is enough for me to say that this rule must be discharged.

MANISTY, J. I entirely concur in the opinion expressed by my Brother Pollock. All the authorities ancient and modern which have any application to this subject were elaborately reviewed in the very learned judgment of Willes, J., in *Ex parte Fernandez*. (1) The result is thus summed up at p. 49 of 10 C. B. (N.S.): "The result is, that, historically, the Courts of Assize, as being Courts of general jurisdiction in all criminal cases, and having power to try all issues of fact of whatever importance arising in the several counties on their circuits, to which, therefore, every man is indebted in a greater or less degree for the protection of his property, his liberty, and his life, do stand in the place of the antient iters of the justices itinerant, and are a superior Court, so to speak, by succession: whilst, practically, regard being had to the powers which they exercise, they are, as to criminal matters, Courts of the most extensive jurisdiction, and, as to civil causes, periodical sittings of the judges of the superior Courts, or in their necessary absence, of others thought worthy to

(1) 10 C. B. (N.S.) 3; 31 L. J. (C.P.) 321.

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be associated with them for trying in the country those issues of fact which can be more conveniently disposed of there than in London or Middlesex. For this purpose they are as much branches of the superior Courts, having all the power which could be exercised by those Courts themselves at the trial, as are the chief or other justices of those Courts sitting at nisi prius in London or Middlesex: and the case of a judge at nisi prius in town furnishes an apt illustration of the power of a justice of assize at the trial of a cause." That equally applies to the judges and justices of the Central Criminal Court. The rule will therefore be discharged, but without costs.

Rule discharged.

Solicitors for applicant: *Phelps, Sidgwick, & Biddle.*
Solicitor for the justices: *Solicitor to the Treasury.*

J. S.

THE LONDON AND NORTH WESTERN RAILWAY COMPANY AND OTHERS *v.* PRICE & SON.

June 13.

Railway Company—Contract—Ultrà Vires—Charge for Weighing Goods carried by Railway Company.

A railway company carried coals on their line for the defendants, who were coal merchants, and delivered them at the defendants' wharf which adjoined a siding at one of the company's stations, and they allowed the defendants, in consideration of paying a specified reasonable charge, to weigh out the coals to customers by a machine belonging to the company placed in the station yard. The company had no express statutory power to make charges for the use of their weighing-machines:—

Held, that the charges were not ultrà vires, and the company could maintain an action to recover them from the defendants.

SPECIAL CASE stated in an action in the county court of Shropshire holden at Shrewsbury.

The case stated the following material facts:—

The action was brought to recover a sum of 1*l.* 11*s.* 2*d.*, in respect of charges made by the plaintiffs for weighing coal for the defendants.

The defendants were coal merchants carrying on business at Minsterley Station, which is on a branch line of the Shrewsbury

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and Welchpool Railway. The railway and branch line were constructed under powers given by a local Act (19 & 20 Vict. c. cxxxii.), and were subsequently transferred to and became the property of the plaintiffs under the provisions of the local Acts, 27 & 28 Vict. c. cxcvi. and 28 & 29 Vict. c. ccxcix.

The defendants for the purposes of their business occupied, as tenants to the plaintiffs, a wharf in the yard of the station adjoining a siding of the railway, and they paid to the plaintiffs a rent of 1*s.* per square yard per annum for the land so occupied. All the coal supplied to the defendants for their business at Minsterley Station was conveyed thither by the plaintiffs upon their railway and delivered to the defendants at the wharf, and therefrom sold and delivered by the defendants to their customers.

The plaintiffs had a weighing-machine suitable for weighing coals fixed in the yard of the station, and used by them from time to time for their own purposes. The defendants, on receiving consignments of coal at the station, generally had occasion to weigh the coal before delivering the same to purchasers. There was no other machine than that belonging to the plaintiffs suitable for weighing coal at or near the station. For some years previously to April, 1882, the defendants, and other wharfholders at Minsterley Station, had used the plaintiffs' weighing-machine without charge; but in February, 1882, the plaintiffs put up a printed notice in the station addressed "to the public," and stating that on and after the 1st of April, 1882, the sum of 1*d.* per ton, or part of a ton, would be charged by them for the weighing of all coal over their machines, whether the persons for whom the weighing was done were wharfholders or not. The defendants had knowledge of this notice.

The defendants continued to weigh coal on the plaintiffs' machine during the months of April and May, 1882, and paid the plaintiffs' charges, in respect of coal so weighed, according to the notice. The defendants subsequently to May, 1882, weighed coal on the machine, but refused to pay any charge therefor, and it was agreed that, if the action was maintainable, the sum of 1*l.* 2*s.* was due from the defendants to the plaintiffs in respect thereof.

At the hearing in the county court the defendants contended that the charges made and claimed by the plaintiffs did not come

within their tariff of charges, and were made without any statutory authority.

The judge nonsuited the plaintiffs, holding that the services and charges in respect of which the claim was made were ultrà vires of the plaintiffs' statutory authority.

The question for the opinion of the Court was whether or not the charges were ultrà vires of the plaintiffs' statutory authority.

Wightman Wood (*J. V. Austin*, with him), for the plaintiffs, contended that the charges were authorized by certain provisions of the local Acts under which the railway and branch line were constructed and subsequently transferred to the plaintiffs; and that the charges, assuming them not to be within the terms of those provisions, were so incidental to the purposes for which the line was constructed, and so convenient for the due carrying out of those purposes, as to be within the plaintiffs' powers. He cited *Ashbury Ry. Carriage Co.* v. *Riche* (1) and *Attorney General* v. *Great Eastern Ry. Co.* (2)

Kenelm Digby, for the defendants, contended that the plaintiffs had no statutory authority, express or implied, to make the charges; that the terms of the contract between the plaintiffs and the defendants were contained in the notice put up in the station by the plaintiffs, and afterwards accepted and acted upon by the defendants; that the contract was ultrà vires and therefore void, the notice being addressed to the public and not merely to persons for whom the plaintiffs carried coals; and that, apart from the notice, the company had no power to charge wharfholders for weighing coals, the service rendered being independent of, and in no way incidental to, the contract of carriage.

WATKIN WILLIAMS, J. I am clearly of opinion that the nonsuit in this case was wrong, and that the judgment of the county court judge must be reversed. It is only necessary to state the facts to shew that the case is absolutely clear in favour of the plaintiffs. [His Lordship stated them.] It is to my mind an astonishing proposition that the defendants, having used the plaintiffs' weighing machine, and having agreed to pay for the

(1) Law Rep. 7 H. L. 653. (2) 11 Ch. D. 449; 5 App. Cas. 473.

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use of it—for that is the effect of the facts stated in the case—should now be entitled to say that the contract was ultrà vires and void, and so could not be the foundation of any action at law. No doubt if the contract was ultrà vires, no effect whatever can be given to it; the Court cannot travel beyond the legal result of the parties' acts. But I am of opinion that the contract was not ultrà vires. The observations of Lord Justice James in *Attorney General* v. *Great Eastern Ry. Co.* (1), are applicable to this case. He asks, "Where is this notion of ultrà vires to stop?" and states various instances in which it would be absurd to say that the doctrine applied. I think that his observations cover this case, and I am of opinion that the plaintiffs, who possessed the weighing-machine for the purposes of their railway, and as incidental to their business as carriers, had a perfect right to allow, not only the persons for whom they carried coals, but also the public at large, to have the occasional use and convenience of the machine, and were entitled to make a fair charge for the use of it. I cannot distinguish this case from the cases of refreshment rooms and other conveniences in stations, not strictly connected with the business of a railway company, but established for the advantage of those with whom they come into contact in the course of their business.

A. L. SMITH, J. I am also of opinion that the plaintiffs were entitled to succeed, and I rest my decision solely on the facts of this case. The plaintiffs carried coals for the defendants, and at the termination of the carriage the plaintiffs warehoused the coals, which were in bulk and supplied in large quantities. The defendants request the plaintiffs to weigh the coal for them on the plaintiffs' machine, knowing perfectly well that a charge of 1*d.* per ton will be made for the use of the machine. The coal is weighed, and in answer to an action for the weighing charges, the defendants set up that the whole transaction was ultrà vires on the part of the company, who are therefore not entitled to recover.

The argument of the defendants' counsel convinced me that the charge was not expressly authorised by any of the Acts of Parliament relied on by the plaintiffs' counsel. The question arises—

(1) 11 Ch. D. at p. 480.

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assuming that the charge is not within the direct terms of those Acts—whether or not this action can be maintained on the ground that the service is incidental and convenient to the exercise of the plaintiffs' powers as carriers of goods for the defendants. It seems to me most convenient that the company should do what they have done. It was argued that the notice informing persons of the charge to be made was invalid. I give no opinion upon that. I think the notice formed no part of the contract. If it had been necessary to put the notice in at the trial, could it have been suggested that it must be stamped as being the contract between the parties? The plaintiffs are entitled to say to the defendants, "at your request we weighed the coal, and you knew the charge, which was a reasonable one, because you knew of the notice." I am of opinion that this case comes clearly within the principle of the decision in *Attorney-General* v. *Great Eastern Ry. Co.* (1) In that case the Lord Chancellor, agreeing with the judgment of Lord Justice James, in *Ashbury Ry. Carriage Co.* v. *Riche* (2), said that this doctrine of ultrà vires ought to be reasonably, and not unreasonably, understood and applied, and that whatever might fairly be regarded as incidental to, or consequent upon, those things which the legislature had authorised, ought not (unless expressly prohibited), to be held by judicial construction to be ultrà vires. It is manifest that in the present case the charge made is not expressly prohibited. I am of opinion that it was made for work done and services rendered, which were incidental to, and consequent upon, those things which the legislature had authorised; and therefore in my judgment the action is maintainable.

Judgment for the plaintiffs.

Solicitor for plaintiffs: *R. R. Nelson.*
Solicitors for defendants: *Paterson, Snow, & Bloxam.*

(1) 5 App. Cas. 473. (2) Law Rep. 7 H. L. 653.

W. A.

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July 2.

THE OVERSEERS OF THE TOWNSHIP OF MIDDLESBROUGH, APPELLANTS; THE JUSTICES OF THE NORTH RIDING OF YORKSHIRE, RESPONDENTS.

County Rate—Borough, Liability to County Rate—Main Roads—Middlesbrough Extension and Improvement Acts, 1866 (29 & 30 *Vict. c. cxliii.*) *and* 1874 (38 *Vict. c. cviii.*)—*Highways and Locomotives* (*Amendment*) *Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 13.

By a local Act, passed in 1874, the limits of the borough of Middlesbrough were extended, and all lands, &c., within the extended area, and all persons in respect of the same, were exempted "from all county rates save only in respect of the purposes for which any county rates are now leviable within the existing borough;" and the Act further provided that the urban sanitary authority should be liable to the maintenance and repair of all streets and roads being public highways within the extended area, and that the inhabitants should not, in respect of any lands, &c., within that area, be liable to any payment in respect of the making or repairing of any highway beyond the limits thereof. At the time of the passing of the Act general county rates were leviable within the existing borough for all purposes for which general county rates could be levied in any part of the riding, but those purposes did not include the maintenance of any main or other roads outside the limits of the borough. By s. 13 of the Highways and Locomotive (Amendment) Act, 1878, any road which has ceased to be a turnpike road in manner described by the Act, shall be deemed to be a "main road," and one half of the expense incurred by the highway authority in the maintenance of such road shall, as to every part thereof within any highway area, be contributed out of the county rate:—

Held, that the provisions of the local Act did not exempt the inhabitants of the extended area of the borough from liability to pay county rates, under s. 13 of the Highways and Locomotives (Amendment) Act, 1878, in respect of the maintenance of main roads outside the limits of the extended area.

Appeal from an order made on a case stated by the justices, at quarter sessions, of the North Riding of the county of York.

The material facts stated in the case, and the arguments of counsel, sufficiently appear in the judgment.

Forbes, Q.C. (*R. Luck*, with him), for the appellants.

Meysey Thompson, for the respondents.

The following authorities were referred to in addition to that mentioned in the judgment: *Reg.* v. *Heath* (1); *Fitzgerald* v.

(1) Law Rep. 1 Q. B. 218.

Champneys (1); *Reg.* v. *Overseers of Walsall* (2); *Thorpe* v. *Adams* (3); *Reg.* v. *London and North Western Ry. Co.* (4)

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OVERSEERS OF MIDDLESBROUGH *v.* JUSTICES OF YORKSHIRE.

Cur. adv. vult.

July 2. The judgment of the Court (Watkin Williams, J., and A. L. Smith, J.), was delivered by

WATKIN WILLIAMS, J. This was an appeal by the overseers of the poor of the township of Middlesbrough to the quarter sessions of the North Riding of Yorkshire against a general county rate made upon the 27th of June, 1882.

The quarter sessions dismissed the appeal subject to a case which they stated for the opinion of this Court; and we have to say whether this order of quarter sessions dismissing the appeal should be quashed or confirmed. The case was argued before my Brother A. L. Smith and myself, and I now proceed to give judgment, in which he concurs.

The facts are as follows:—The borough of Middlesbrough is a municipal borough under the Municipal Corporation Acts, and has a separate commission of the peace, but not a separate court of quarter sessions, and it is wholly within the North Riding of Yorkshire. In the year 1866 the limits of the existing borough of Middlesbrough were extended and enlarged by the Middlesbrough Extension and Improvement Act, 1866. Sect. 28 of that Act enacts that "the borough" (meaning, according to the interpretation clause, the extended area) "shall be exempt from all liability to the support of the county police, and from all county rates save only in respect of the purposes for which any county rates are now leviable within the existing borough;" and s. 31 enacts that "the local board shall be liable to the maintenance and repair of all the streets and roads within the district, being public highways, and the inhabitants within the district shall not, in respect of any lands . . . within the district, be liable to any payment whatsoever in respect of the making or repairing of any highway beyond the limits of the district." Immediately previous to the passing of this Act general county

(1) 30 L. J. (Ch.) 777.
(2) 4 Q. B. D. 141; 4 App. Cas. 467.
(3) Law Rep. 6 C. P. 125.
(4) 4 Q. B. D. 147.

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rates were leviable within the borough for all purposes for which general county rates could be levied in any part of the riding. County bridges and their approaches were maintained out of the county rate, but no further contribution was required to be made out of the county rates to any highway authorities for the maintenance of roads. By the Middlesbrough Extension and Improvement Act, 1874, the borough was still further extended by the addition of a large area from the surrounding county, and by ss. 20 and 23 of that Act provisions similar to those of ss. 28 and 31 of the Act of 1866 were enacted. The newly formed area therefore became liable to maintain all streets and roads within the borough district, and was freed from liability to maintain and repair highways beyond the limits of that district, and was freed from liability in respect of all county rates except for the purposes for which county rates were leviable within the former area.

The township of Middlesbrough is a parish within the meaning of 15 & 16 Vict. c. 81, and is comprised in the Middlesbrough Union in the North Riding, and is partly within and partly without the borough of Middlesbrough. In this position of affairs the Highways and Locomotives Amendment Act, 1878, was passed, by the 3rd section of which it is enacted as follows:—"For the purposes of this Act, and subject to its provisions, any road which has, within the period between the 31st day of December, 1870, and the date of the passing of this Act, ceased to be a turnpike road, and any road which, being at the time of the passing of this Act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road; and one half of the expenses incurred from and after the 29th day of September, 1878, by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate, on the certificate of the surveyor of the county authority, or of such other person or persons as the county authority may appoint, to the effect that such main road has been maintained to his or their satisfaction. Provided that no part of such expenses shall be included in (1) any precept or warrant for the levying or

collection of county rate within the metropolis, subject and without prejudice to any provision to be hereafter made; or (2) any order made on the council of any borough having a separate court of quarter sessions under s. 117 of "The Municipal Corporation Act, 1835."

On the 27th of June, 1882, the justices of the North Riding at quarter sessions made a general county rate of $\frac{1}{2}d.$ in the pound upon the assessments of the several parishes and townships in the riding to defray the current general expenditure of the riding during the ensuing quarter, and on the 8th of July a precept was duly issued requiring the guardians of the Middlesbrough Union to pay to the treasurer of the riding a sum of 318*l.* 11*s.* 2*d.* on account of the township of Middlesbrough in respect of the said rate. The guardians of the union paid the amount of the precept to the county treasurer, and the sum was placed by him, as by law required, into the common fund of the county, out of which all moneys required for the various purposes for which county rates are leviable are paid, including the contributions from time to time to be made to the highway authorities for the maintenance of main roads under the Act of 1878. It is against this county rate that the overseers of the township of Middlesbrough appealed to the quarter sessions. The ground of objection to the rate was that a portion of the township, namely, that part of it which was within the borough of Middlesbrough, was not liable to be rated for the maintenance of the main roads, because that was not a purpose for which any county rates were leviable within the borough at the time of the passing of the Middlesbrough Extension Acts of 1866 or 1874, and that, as the rate covered and included an expenditure for which a portion of the township was not liable, the rate was bad.

This question turns upon the true meaning of the enactments contained in ss. 20 and 23 of the Middlesbrough Extension Act, 1874, and the corresponding sections of the Act of 1866, because, if these sections absolutely exempt the borough area from liability to contribute towards such a rate as the present, we are of opinion that the provisions of the public Act of 1878, being merely general, would not destroy the special exemption created by the local Act. The question therefore is, what is the true

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meaning of the sections? Their language is as follows:—[His Lordship read ss. 20 and 23 of the Act of 1874. (1)] Does this mean that the borough area is to be for ever freed from all county rates, except rates for purposes for which a county rate could then be made, and that it shall never be liable to any payment for repairing highways beyond the limits of the district? or does it simply mean that the new area is to be taken so far out of the county and brought within the boundary of the borough as to be placed, in respect to the contributions for county purposes, upon the same footing as the old borough area, not liable for more, but not less liable, than the old area?

Many ingenious arguments were addressed to us on each side of the question, and it may be that a decision might be given either way with reasons that would be quite satisfactory to some minds. In our opinion the key to the true interpretation, and to the true answer to the question, is to be found by examining the relative positions of the borough district and the county district before the Extension Act of 1866. At that time the borough authorities, at the expense of the borough district, maintained and repaired the streets and roads within the borough area, and also maintained the peace therein; and the local highway areas outside the borough maintained and repaired their own highways; and the county at large maintained and repaired the county bridges and approaches out of the general county rate; but this rate, which extended over county and borough area alike, made no other contribution towards the maintenance of highways, and a number of other general county expenses were paid out of the general county rate. The Act of 1878 for the first time threw upon the general county rate one half of the expenses of maintaining and repairing the main roads throughout the county without distinction of place; and the question is whether the borough area is, by virtue of this local Act, exempt from this burden? We are of opinion that it is not exempt. In our view the language of the Extension Acts is to be read as simply placing the new area in the same position as the ancient

(1) It is unnecessary to set out these sections at length, their terms being, in all respects material for the purposes of this report, identical with the terms of ss. 28 and 31 of the Act of 1866.

area of the borough. The new area is to be cut off from the surrounding districts and placed within the borough district; it is to bear its share of maintaining and repairing the streets and roads within the borough, and is to be freed from the liability of contributing to the maintenance and repair of roads in districts outside the borough; it is to bear its share of the borough rates, and is to be freed from liability for county rates, except to the same extent and for the purposes that the ancient borough area was liable. This left the new area liable to such alterations in the general law as might cast new burdens upon the general county rate; of which many examples might be given, such as Justices Clerks Salaries, 40 & 41 Vict. c. 43; Reformatory and Industrial Schools, 29 & 30 Vict. c. 117, s. 28; 29 & 30 Vict. c. 118, s. 36; Prosecutors under the Summary Jurisdiction Act, 42 & 43 Vict. c. 49, s. 28; Fees in Dismissed Cases, 29 & 30 Vict. c. 52; Food and Drugs Act, 38 & 39 Vict. c. 63; Contagious Diseases Animals Acts, 32 & 33 Vict. c. 70; 41 & 42 Vict. c. 74. If it is said that the borough maintains and repairs the streets and roads within its own district, and that it is unjust that it should be made to contribute to the repair of roads in districts outside its area, it may also be said in reply that this is equally true of every separate highway district throughout the county, and that the Act of 1878 deals even handed justice to the districts throughout the county by throwing upon the general county rate one half of the expense of maintaining all the main roads in every part of the county, within whatsoever district situated. Nor does the decision in the recent case of *Corporation of Rochdale* v. *Justices of Lancashire* (1), in any way conflict with this view, because the decision there was that the road in question, which was within the borough of Rochdale, and in respect of which the borough might throw one half the expense of maintaining it upon the county rate, was not in fact a main road at all, and therefore the borough was bound to bear the whole expense. We therefore think that the borough area, like every other area in the county, is liable to contribute towards the moiety of the expenses of maintaining the main roads of the county at large.

This being our opinion we do not consider it necessary to enter

(1) 6 Q. B. D. 525; 8 Q. B. D. 12.

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upon several other difficulties which stand in the way of the appellants. The appeal therefore is dismissed, and the order of sessions is confirmed with costs.

Judgment for the respondents.

Solicitors for appellants: *Helder, Roberts, & Gillett, for H. Watson, Middlesbrough.*

Solicitors for respondents: *R. M. & F. Lowe, for W. C. Trevor, Guisborough.*

W. A.

April 5.

DORMONT *v.* THE FURNESS RAILWAY COMPANY.

Wreck, in Approaches to Harbour, Removal of—Harbour Authority, Liability of—Acts, Local and General, Construction of.

By Act of Parliament 26 & 27 Vict. c. lxxxix. the harbour of B. was vested in the defendants, the limits were defined, and the defendants had jurisdiction over the harbour of P. and the channel of P. beyond those limits for the purpose of, inter alia, buoying "the said harbour and channel," but they were not to levy dues or rates beyond the harbour of B. By 42 & 43 Vict. c. cxlvi. a moiety of the residue of light duties to which ships entering or leaving the harbour of P. contributed, were to be paid to the defendants and to be applied by them in, inter alia, buoying and lighting the harbour and channel of P. A vessel was wrecked in the channel of P., which under the Wrecks Removal Act, 1877 (40 & 41 Vict. c. 16), s. 4, the defendants had power to, and did partially, remove. The wreck not removed was not buoyed, and the plaintiff's vessel was in consequence wrecked:—

Held, that the statutes imposed upon the defendants an obligation to remove the wreck from the channel or to mark its position by buoys, and that not having done so they were liable in damages to the plaintiff.

FURTHER CONSIDERATION of an action tried at Liverpool at the winter assizes of 1883.

On the 8th of September, 1882, the plaintiff's sloop *Agnes* was making her way by Piel Channel to Piel Harbour near Barrow-in-Furness when she struck upon a sunken wreck, and was so much injured that she went down.

The wreck was a ship called *The Brothers*, which had sunk in that place on the 19th of July, 1882. The place where *The Brothers* sunk was outside the harbour of Barrow, but was in the channel leading to the harbour and which led also to Piel Harbour.

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The defendants, the Furness Railway Company, had a certain authority over both the harbours and the channel leading to them, and it was admitted upon the trial of the action that if it was their duty to remove the wreck of *The Brothers*, or to protect ships coming up the channel from the danger of running upon it, they had been guilty of negligence; and the amount of damage was agreed upon at 210*l*. It was also admitted that on the 3rd of August, 1882, the defendants took possession of the wreck of *The Brothers*, and proceeded to remove it, and that they had partially done so by the 8th of that month.

A verdict was entered for the plaintiff subject to the further consideration of the question whether the defendants were upon the construction of the Acts of Parliament liable.

March 19. *Gully, Q.C.*, and *R. Henn Collins* (*W. R. Kennedy*, with them), for the plaintiff. The question of liability arises not only upon the construction of the Acts of Parliament, but also upon the obligation of the defendants at common law, independently of those Acts, to keep the approaches to their harbour in such a state as to be quite safe for the ships of those persons whom they invite to enter. The Acts passed in 1863 (26 & 27 Vict. c. lxxxix.) and in 1879 (42 & 43 Vict. c. cxlvi.) make the defendants the harbour authorities; the limits of the harbour are defined; and the defendants have jurisdiction vested in them over Piel Harbour, and Piel Channel, and their duties are to maintain, improve, regulate, light, and buoy the harbour and channel to a point mentioned, and which is beyond where the wreck happened. The powers granted to the defendants do not confer the right to levy dues and rates beyond the limits of the harbour of Barrow, but they being the authorities in regard to the approaches to the harbour and by the Acts enabled to levy some tolls, there arises an obligation to do all that may be necessary to prevent accidents. Further, the bye-law 17 gives the harbour-master power to remove wrecks, and to retain anything which may be removed to pay expenses; and if anything more had been required there was in 1877 a general Act, the Wrecks Removal Act (40 & 41 Vict. c. 16) passed for the purpose of facilitating the removal of wrecks. The common law obligation is clear. The decisions in *Mersey Docks*

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and Harbour Board v. *Gibbs* (1) and *Winch* v. *Conservators of the Thames* (2) support that view, and the decision in the case of *Forbes* v. *Lee Conservancy Board* (3) was based upon that rule of law. The defendants took possession of the wreck, which they had an exclusive right to do, and thereby they assumed a duty which they were bound to perform properly by removing the whole of it. Having taken possession of the wreck they prevented the owner from doing anything, and as to his conduct there is no proof or admission that there was any negligence. The Wrecks Removal Act of 1877 provides by s. 4 that where any vessel is sunk in any harbour under the jurisdiction of a harbour authority, and likely to become dangerous to navigation, the authority "may take possession" of, and remove it, and "may light or buoy" it and do other things necessary. Thus there was created by the Act a positive duty on the harbour authority to remove the wreck from the approaches to the harbour. The word "may" ought to be read "must," as the section is obligatory and not permissive: *The Douglas.* (4). But even if that be not so, yet as the defendants initiated proceedings by taking possession of the wreck they were bound to perform the duty which by the statutes and the common law is cast upon them, and as they did not perform it, and an accident occurred, they are liable in damages to the plaintiff.

Russell, Q.C., and *Aspland*, for the defendants. It is submitted that the statutes impose no liability upon the defendants, and that they have no power to levy tolls in respect of Piel Harbour, which is an ancient harbour of refuge. No claim is made for dues in respect of that harbour, but ships using it pay a small sum yearly in respect of light dues. The moneys received form a fund, the surplus of which, if any, may come to the hands of the defendants, but no duty has been cast upon the defendants in respect of that harbour. They could have left the wreck where it was. Because they initiated proceedings for its removal that cannot make them liable in damages, even if the work has been imperfectly performed. If the wreck had been in the defendants' own harbour the case would have been different. There would have

(1) Law Rep. 1 H. L. 93.
(2) Law Rep. 9 C. P. 378.
(3) 4 Ex. D. 116.
(4) 7 P. D. 151.

been a duty. The plaintiff is virtually a stranger to the defendants, and he is not the less so because he paid a small sum to a fund of which the defendants may at some time have a share. As to the Act of 1877, s. 4, the language is clearly permissive, the harbour authority "may sell" the wreck and "may, out of the proceeds of such sale, reimburse themselves for the expenses incurred by them" under the Act. The primary object of the statute is not to create an obligation. There are many enactments, but in none of them is any obligation in express terms put upon the harbour authorities. The measure of obligation is left to the defendants' own view as to what ought to be done. They are an independent public body, and they can proceed to exercise their powers as they think best in carrying out the objects for which those powers have been granted by the legislature. The decision in *The Douglas* (1) is no authority in this case. It cannot be made applicable because the defendants may receive a small sum from the harbour authority of the port of Lancaster which had been paid for light dues, and some of which the plaintiff may possibly have paid; and further, the power exercised by the defendants is permissive—they may have left the owner to remove the wreck, and considering all the circumstances they are not liable in damages. [They referred to *Collis* v. *Selden*. (2)]

Gully, Q.C., in reply, referred to the case of *White* v. *Crisp* (3), to shew that the owner so long as he had control over the vessel wrecked was liable, but that his liability ceased when the obligation was transferred to the authorities whose duty it was to remove the wreck.

Cur. adv. vult.

April 5. KAY, J., after stating the facts above set forth, continued. It was argued that under the Acts of Parliament which relate to the matter a duty to protect ships against this wreck was thrown upon the defendants; and secondly, that even if that were not so, by taking possession and commencing to destroy it they assumed that duty, and are therefore liable. There is no evidence as to how *The Brothers* was sunk, whether by negligence of the

(1) 7 P. D. 151. (2) Law Rep. 3 C. P. 495.
(3) 10 Ex. 312.

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master, or not. I think I must infer that after being sunk she was abandoned by the owner.

By the statute passed in 1863 (26 & 27 Vict. c. lxxxix.), the harbour of Barrow was vested in the defendants, the Furness Railway Company, and s. 14 defined the limits of the harbour, and provided that the company should have jurisdiction over Piel Harbour and Piel Channel beyond those limits "for the purpose of maintaining, improving, and regulating and buoying the said harbour and channel" to a point there mentioned as Helpsford Scar which is further seaward than the place where this accident occurred. But it was further provided that such powers should not confer on the company the right to levy dues or rates beyond the limits of the harbour of Barrow, and that the defendants should not in any manner impede the present access to Piel Harbour or diminish or affect in any way its present use, conveniences, privileges, or immunities as a harbour of refuge.

By another Act passed in 1879 (42 & 43 Vict. c. cxlvi.), reciting that section, it was provided that the powers of the harbour-master should comprise and include the harbour of Barrow and Piel Harbour and Piel Channel beyond the place of this accident, but that nothing in the Act should confer upon the company the right to levy dues or rates beyond the limits of the harbour of Barrow, and by s. 29, after certain deductions, one half of the residue of certain light duties to which ships entering or leaving Piel Harbour and Piel Channel were liable to contribute were to be paid to the defendants, the company, and to be applied by them in "maintaining, buoying, lighting, regulating, and improving Piel Harbour and Piel Channel as far as Helpsford Scar and to no other purpose."

The 17th bye-law gave the harbour-master power to remove wrecks and obstructions, and to retain anything so removed to defray the expenses of such removal. In 1877 there was passed a general Act to facilitate the removal of wrecks (40 & 41 Vict. c. 16) obstructing navigation. Sect. 4 provides, "Where any vessel is sunk, stranded, or abandoned in any harbour or tidal water under the jurisdiction of a harbour or conservancy authority, or in or near any approach thereto, in such manner as in the opinion of the authorities to be or be likely to become an

obstruction or danger to navigation in that harbour or water, or in any approach thereto, the authority may take possession of and raise, remove, or destroy the whole or any part of the vessel, and may light or buoy any such vessel or part until the raising, removal, or destruction thereof, and may sell in such manner as they shall think fit any vessel or part so raised or removed, and also any other property recovered in the exercise of their powers under this Act, and may, out of the proceeds of such sale, reimburse themselves for the expenses incurred by them under this Act, and shall hold the surplus (if any) of such proceeds in trust for the persons entitled thereto."

Sect. 5 gives similar powers to the general lighthouse authorities for that part of the United Kingdom in or near which the wreck is situate if there is no harbour or conservancy authority having the power to remove the same. It was argued that the 4th section of this statute, although in terms permissive, imposes a duty upon the harbour or conservancy authorities, and this argument is to some extent strengthened by the 3rd section, which defines harbour and conservancy authority as including all persons or bodies of persons entrusted with the duty or invested with the powers of improving harbours or tidal waters. In the case of an authority intrusted with such duty, at least it may be plausibly argued that this addition to their powers implies an additional duty; on the other hand, if s. 4 imposes this duty upon a harbour authority, it is difficult to avoid the conclusion that s. 5 must impose a like duty upon the lighthouse authority where there is no harbour or conservancy authority. In the case of *The Douglas* (1) Brett, L.J., during the argument, observed that the statute related to the performance of a public duty, and asked whether the word "may" in s. 4 was not to be read "must." I do not find anything to that effect in his judgment: in that case Lord Coleridge declined to give an opinion upon the point, but Cotton, L.J., intimates that under that section it became the duty of the harbour-master to remove a dangerous obstruction. The reluctance of the Court to construe permissive words in a statute as obligatory is shewn by the language used by the House of Lords in the case of *Julius* v. *Bishop of Oxford* (2), in which the

(1) 7 P. D. 151. (2) 5 App. Cas. 214.

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principal authorities on the subject are referred to and commented on. It is obviously a strong construction to treat permissive words as imposing a serious obligation, which if neglected may expose the body so empowered to heavy damages, and I should hesitate to hold, on this ground alone, that the defendants were liable. Nor do I see, if the owner of *The Brothers* had not become, by negligence or otherwise, liable for the consequences of his ship being sunk in the Piel Channel, how the harbour authority, by simply commencing to remove the wreck, can be held to have incurred a duty not otherwise cast upon them. But by the Act of 1879 the defendants were empowered to receive a certain proportion of the light dues from ships entering Piel Harbour and Piel Channel, and these dues were to be applied by them in maintaining, buoying, lighting, regulating, and improving Piel Harbour and Piel Channel up to and beyond the place of the accident. It seems to me that those words did impose upon them an obligation to remove such an obstruction as this wreck, and to mark its position by buoys until removed, and to apply whatever funds they might receive under the Act for that purpose, and on this ground I think the action against them must succeed. The case, in my opinion, comes within the authority of the *Mersey Docks Trustees* v. *Gibbs* (1), and judgment must accordingly be given for the plaintiff for the agreed amount of damages, and for the costs of the action.

Judgment for the plaintiff.

Solicitors for plaintiff: *Parkers, for Bradshaw, Barrow-in-Furness.*

Solicitors for defendants: *Tahourdins & Hargreaves, for S. Hart Jackson, Ulverston.*

(1) Law Rep. 1 H. L. 93.

T. F. M.

104.
(1883) 11 Q. B. D. 503. HEAVEN v. PENDER.
Applied. PRATT v. RICHARDS [1951] 2 K. B. 208
ied. HORTON v. DON GRAVING Co., LD. 1950] 1 K. B. 421

[IN THE COURT OF APPEAL.]

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July 30.

HEAVEN *v.* PENDER, TRADING AS WEST INDIA GRAVING DOCK COMPANY.

Negligence—Breach of Duty—Defective Article supplied for Use—Liability of Person supplying a Defective Article causing Injury to the Person who used it.

The defendant, a dock owner, supplied and put up a staging outside a ship in his dock under a contract with the shipowner. The plaintiff was a workman in the employ of a ship painter who had contracted with the shipowner to paint the outside of the ship, and in order to do the painting the plaintiff went on and used the staging, when one of the ropes by which it was slung, being unfit for use when supplied by the defendant, broke, and by reason thereof the plaintiff fell into the dock and was injured:—

Held, reversing the decision of the Queen's Bench Division, that the plaintiff, being engaged on work on the vessel in the performance of which the defendant, as dock owner, was interested, the defendant was under an obligation to him to take reasonable care that at the time he supplied the staging and ropes they were in a fit state to be used, and that for the neglect of such duty the defendant was liable to the plaintiff for the injury he had sustained:

Held, also, by Brett, M.R., that whenever one person is by circumstances placed in such a position with regard to another, that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.

ACTION to recover damages for injuries alleged to have been sustained by the plaintiff through the negligence of the defendant, under the following circumstances:—

The defendant was the owner of a dry dock used for the painting and repairing vessels, and as incident to its being so used he supplied and put up the staging necessary to enable the outside of the vessel to be painted and repaired when in the dock, but after the staging had been handed over to the shipowner it no longer remained under the control of the defendant.

The plaintiff was a ship painter in the employ of one William Gray, a master painter, who had contracted with the owner of a vessel in the defendant's dock to paint the outside of the vessel, and on the 8th of April, 1882, whilst the plaintiff was engaged in painting the vessel, and using for that purpose the staging which

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the defendant had put up on that same day, one of the ropes by which it was suspended from the vessel gave way, and the plaintiff fell in consequence into the dock and was injured.

The ropes had been supplied by the defendant as part of the machinery of the staging, and there was evidence that they had been scorched and were unfit for use with safety at the time the staging was put up, and that reasonable care had not been taken by the defendant as to their state and condition at that time.

The action was remitted for trial before the Bow County Court under s. 10 of the County Court Act, 1867 (30 & 31 Vict. c. 142). The county court judge gave judgment for the plaintiff for 20*l.*, the amount of damages agreed between the parties.

The Queen's Bench Division, on motion by way of appeal, ordered judgment to be entered for the defendant. (1)

The plaintiff appealed.

A. Charles, Q.C., and *C. C. Scott*, for the plaintiff. The plaintiff was in the defendant's dock on the business of the shipowner, that is to say, on the work of the ship, and in the course of such work he was using the staging put up for that purpose by the defendant. There was therefore a duty on the defendant's part towards the plaintiff that the staging should be in a state of reasonable safety and fitness for the work. The plaintiff was on the defendant's property by invitation, and the staging was in fact dangerous and in the nature of a trap, and the defendant was therefore liable for the injury it caused to the plaintiff. The case resembles *Indermaur* v. *Dames* (2) and *Smith* v. *London and St. Katharine Docks Co.* (3) The defendant must have known that the staging would be used by painters in order to paint the vessel as much as in *Smith* v. *London and St. Katharine Docks Co.* (3) it was known by the docks company that the gangway would be used by passengers to go to the ship. *Winterbottom* v. *Wright* (4) is distinguishable from the present case, as there the only duty was one which arose from contract, and as the plaintiff was not a party to the contract there was no privity between him

(1) 9 Q. B. D. 302.
(2) Law Rep. 1 C. P. 274; Law Rep. 2 C. P. 311.
(3) Law Rep. 3 C. P. 326.
(4) 10 M. & W. 109.

and the defendant, and therefore no right to sue. There is nothing inconsistent between *Winterbottom* v. *Wright* (1) and *George* v. *Skivington* (2) and it is not necessary, as the Queen's Bench Division considered, to elect between those two cases. *George* v. *Skivington* (2) was an extension of *Langridge* v. *Levy* (3) to a case of negligence in which the defendant knew by whom the article he supplied would be used. That case is good law, and supports the present. *Collis* v. *Selden* (4) and *Sullivan* v. *Waters* (5) are distinguishable, as the plaintiff in both those cases was only a licensee, and there was no invitation in either of them as there was to the plaintiff in this case. *Longmeid* v. *Holliday* (6) is also distinguishable, as there there was no negligence.

[They also referred to *Corby* v. *Hill* (7); *Todd* v. *Flight* (8); *Gandy* v. *Jubber* (9); *Brass* v. *Maitland* (10); *Blackmore* v. *Bristol & Exeter Ry. Co.* (11); *Macarthy* v. *Younge* (12) and *Francis* v. *Cockrell.* (13)]

Bompas, Q.C., and *H. Dickens*, for the defendant. As soon as the staging had been put up against the sides of the vessel it became, as it were, part of the vessel, and the defendant's liability in respect of it ceased, for he had no longer any control over it. The defendants' liability, if at all, could only arise out of the contract under which he supplied the staging with the use of the dock to the shipowner, and therefore no one who was not a party to that contract could sue the defendant: *Alton* v. *Midland Ry. Co.* (14) and *Dickson* v. *Reuter's Telegraph Co.* (15) The case of *Winterbottom* v. *Wright* (1) governs the present case. *George* v. *Skivington* (2) is the first case in which a person who negligently supplied a defective article to a customer was liable to any one who might use it. There was no fraud in the present case, or anything to

(1) 10 M. & W. 109.
(2) Law Rep. 5 Ex. 1.
(3) 2 M. & W. 519; 4 M. & W. 337.
(4) Law Rep. 3 C. P. 495.
(5) 14 Ir. L. R. (N.S.) 460.
(6) 6 Ex. 761; 20 L. J. (Ex.) 430.
(7) 4 C. B. (N.S.) 556; 27 L. J. (C.P.) 318.
(8) 9 C. B. (N.S.) 377.
(9) 5 B. & S. 78.
(10) 6 E. & B. 470; 26 L. J. (Q.B.) 49.
(11) 8 E. & B. 1035.
(12) 6 H. & N. 329; 30 L. J. (Ex.) 227.
(13) Law Rep. 5 Q. B. 184, at p. 501.
(14) 19 C. B. (N.S.) 213.
(15) 2 C. P. D. 62.

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shew that the defendant was aware of the defective state of the rope. *Langridge* v. *Levy* (1) was decided entirely on the ground that there was fraud there by the defendant, and the Court agreed that in the absence of fraud such an action would not lie.

[COTTON, L.J., referred to *Dixon* v. *Bell*. (2)]

That was the case of a dangerous instrument, a loaded gun, which the defendant knew to be loaded. *Collis* v. *Selden* (3) shews that the mere fact that the defendant knew that such a person as the plaintiff might probably use the staging would not amount to an invitation to him to use it. Unless the defendant knew of the dangerous condition of the staging there was no duty he owed the plaintiff for the breach of which he could be liable: *Southcote* v. *Stanley* (4); *Gerhard* v. *Bates*. (5)

Cur. adv. vult.

July 30. The following judgments were delivered:—

BRETT, M.R. In this case the plaintiff was a workman in the employ of Gray, a ship painter. Gray entered into a contract with a shipowner whose ship was in the defendant's dock to paint the outside of his ship. The defendant, the dock owner, supplied, under a contract with the shipowner, an ordinary stage to be slung in the ordinary way outside the ship for the purpose of painting her. It must have been known to the defendant's servants, if they had considered the matter at all, that the stage would be put to immediate use, that it would not be used by the shipowner, but that it would be used by such a person as the plaintiff, a working ship painter. The ropes by which the stage was slung, and which were supplied as a part of the instrument by the defendant, had been scorched and were unfit for use and were supplied without a reasonably careful attention to their condition. When the plaintiff began to use the stage the ropes broke, the stage fell, and the plaintiff was injured. The Divisional Court held that the plaintiff could not recover against the defendant. The plaintiff appealed. The action is in form and substance an action for negligence. That the stage was, through

(1) 2 M. & W. 519; 4 M. & W. 337.
(2) 5 M. & S. 198.
(3) Law Rep. 3 C. P. 495.
(4) 1 H. & N. 247.
(5) 2 E. & B. 476.

want of attention of the defendant's servants, supplied in a state unsafe for use is not denied. But want of attention amounting to a want of ordinary care is not a good cause of action, although injury ensue from such want, unless the person charged with such want of ordinary care had a duty to the person complaining to use ordinary care in respect of the matter called in question. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff, without contributory negligence on his part, has suffered injury to his person or property. The question in this case is whether the defendant owed such a duty to the plaintiff.

If a person contracts with another to use ordinary care or skill towards him or his property the obligation need not be considered in the light of a duty; it is an obligation of contract. It is undoubted, however, that there may be the obligation of such a duty from one person to another although there is no contract between them with regard to such duty. Two drivers meeting have no contract with each other, but under certain circumstances they have a reciprocal duty towards each other. So two ships navigating the sea. So a railway company which has contracted with one person to carry another has no contract with the person carried but has a duty towards that person. So the owner or occupier of house or land who permits a person or persons to come to his house or land has no contract with such person or persons, but has a duty towards him or them. It should be observed that the existence of a contract between two persons does not prevent the existence of the suggested duty between them also being raised by law independently of the contract, by the facts with regard to which the contract is made and to which it applies an exactly similar but a contract duty. We have not in this case to consider the circumstances in which an implied contract may arise to use ordinary care and skill to avoid danger to the safety of person or property. We have not in this case to consider the question of a fraudulent misrepresentation express or implied, which is a well recognised head of law. The questions which we have to solve in this case are—what is the proper definition of the relation between two persons other than the

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relation established by contract, or fraud, which imposes on the one of them a duty towards the other to observe, with regard to the person or property of such other, such ordinary care or skill as may be necessary to prevent injury to his person or property; and whether the present case falls within such definition. When two drivers or two ships are approaching each other, such a relation arises between them when they are approaching each other in such a manner that, unless they use ordinary care and skill to avoid it, there will be danger of an injurious collision between them. This relation is established in such circumstances between them, not only if it be proved that they actually know and think of this danger, but whether such proof be made or not. It is established, as it seems to me, because any one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill under such circumstances there would be such danger. And every one ought by the universally recognised rules of right and wrong, to think so much with regard to the safety of others who may be jeopardised by his conduct; and if, being in such circumstances, he does not think, and in consequence neglects, or if he neglects to use ordinary care or skill, and injury ensue, the law, which takes cognisance of and enforces the rules of right and wrong, will force him to give an indemnity for the injury. In the case of a railway company carrying a passenger with whom it has not entered into the contract of carriage the law implies the duty, because it must be obvious that unless ordinary care and skill be used the personal safety of the passenger must be endangered. With regard to the condition in which an owner or occupier leaves his house or property other phraseology has been used, which it is necessary to consider. If a man opens his shop or warehouse to customers it is said that he invites them to enter, and that this invitation raises the relation between them which imposes on the inviter the duty of using reasonable care so to keep his house or warehouse that it may not endanger the person or property of the person invited. This is in a sense an accurate phrase, and as applied to the circumstances a sufficiently accurate phrase. Yet it is not accurate if the word "invitation" be used in its ordinary sense. By opening a shop you do not really invite, you do not ask

A. B. to come in to buy; you intimate to him that if it pleases him to come in he will find things which you are willing to sell. So, in the case of shop, warehouse, road, or premises, the phrase has been used that if you permit a person to enter them you impose on yourself a duty not to lay a trap for him. This, again, is in a sense a true statement of the duty arising from the relation constituted by the permission to enter. It is not a statement of what causes the relation which raises the duty. What causes the relation is the permission to enter and the entry. But it is not a strictly accurate statement of the duty. To lay a trap means in ordinary language to do something with an intention. Yet it is clear that the duty extends to a danger the result of negligence without intention. And with regard to both these phrases, though each covers the circumstances to which it is particularly applied, yet it does not cover the other set of circumstances from which an exactly similar legal liability is inferred. It follows, as it seems to me, that there must be some larger proposition which involves and covers both sets of circumstances. The logic of inductive reasoning requires that where two major propositions lead to exactly similar minor premisses there must be a more remote and larger premiss which embraces both of the major propositions. That, in the present consideration, is, as it seems to me, the same proposition which will cover the similar legal liability inferred in the cases of collision and carriage. The proposition which these recognised cases suggest, and which is, therefore, to be deduced from them, is that whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. Without displacing the other propositions to which allusion has been made as applicable to the particular circumstances in respect of which they have been enunciated, this proposition includes, I think, all the recognised cases of liability. It is the only proposition which covers them all. It may, therefore, safely be affirmed to be a true proposition, unless some obvious case can be stated in

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which the liability must be admitted to exist, and which yet is not within this proposition. There is no such case. Let us apply this proposition to the case of one person supplying goods or machinery, or instruments or utensils, or the like, for the purpose of their being used by another person, but with whom there is no contract as to the supply. The proposition will stand thus: whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognise at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens a legal liability arises to be enforced by an action for negligence. This includes the case of goods, &c., supplied to be used immediately by a particular person or persons or one of a class of persons, where it would be obvious to the person supplying, if he thought, that the goods would in all probability be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it. It would exclude a case in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect, or where the goods would be of such a nature that a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property. The cases of vendor and purchaser and lender and hirer under contract need not be considered, as the liability arises under the contract, and not merely as a duty imposed by law, though it may not be useless to

observe that it seems difficult to import the implied obligation into the contract except in cases in which if there were no contract between the parties the law would according to the rule above stated imply the duty.

Examining the rule which has been above enunciated with the cases which have been decided with regard to goods supplied for the purpose of being used by persons with whom there is no contract, the first case to be considered is inevitably *Langridge* v. *Levy*. (1) It is not an easy case to act upon. It is not, it cannot be, accurately reported; the declaration is set out; the evidence is assumed to be reported; the questions left to the jury are stated. And then it is said that a motion was made to enter a nonsuit in pursuance of leave reserved on particular grounds. Those grounds do not raise the question of fraud at all, but only the question of remoteness. And although the question of fraud seems in a sense to have been left to the jury, yet no question was, according to the report, left to them as to whether the plaintiff acted on the faith of the fraudulent misrepresentation which is, nevertheless, a necessary question in a case of fraudulent misrepresentation. The report of the argument makes the object of the argument depend entirely upon an assumed motion to arrest the judgment, which raises always a discussion depending entirely on the form of the declaration, and the effect on it of a verdict, in respect of which it is assumed that all questions were left to the jury. If this was the point taken the report of the evidence and of the questions left to the jury is idle! The case was decided on the ground of a fraudulent misrepresentation as stated in the declaration. It is inferred that the defendant intended the representation to be communicated to the son. Why he should have such an intention in fact, it seems difficult to understand. His immediate object must have been to induce the father to buy and pay for the gun. It must have been wholly indifferent to him whether after the sale and payment the gun would be used or not by the son. I cannot hesitate to say that, in my opinion, the case is a wholly unsatisfactory case to act on as an authority. But taking the case to be decided on the ground of a fraudulent misrepresentation made hypothetically to

(1) 2 M. & W. 519; 4 M. & W. 337.

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the son, and acted upon by him, such a decision upon such a ground, in no way negatives the proposition that the action might have been supported on the ground of negligence without fraud. It seems to be a case which is within the proposition enunciated in this judgment, and in which the action might have been supported without proof of actual fraud. And this seems to be the meaning of Cleasby, B., in the observations he made on *Langridge* v. *Levy* (1) in the case of *George* v. *Skivington*. (2) In that case the proposition laid down in this judgment is clearly adopted. The ground of the decision is that the article was, to the knowledge of the defendant, supplied for the use of the wife and for her immediate use. And certainly, if he or anyone in his position had thought at all, it must have been obvious that a want of ordinary care or skill in preparing the prescription sold, would endanger the personal safety of the wife.

In *Corby* v. *Hill* (3) it is stated by the Lord Chief Justice that an allurement was held out to the plaintiff. And Willes, J. stated that the defendant had no right to set a trap for the plaintiff. But in the form of declaration suggested by Willes, J., on p. 567, there is no mention of allurement, or invitation, or trap. The facts suggested in that form are, "that the plaintiff had license to go on the road, that he was in consequence accustomed and likely to pass along it, that the defendant knew of that custom and probability, that the defendant negligently placed slates in such a manner as to be likely to prove dangerous to persons driving along the road, that the plaintiff drove along the road, being by reason of the licence lawfully on the road, and that he was injured by the obstruction." It is impossible to state a case more exactly within the proposition laid down in this judgment. In *Smith* v. *London and St. Katharine Docks Co.* (4), the phrase is again used of invitation to the plaintiff by the defendants. Again, let it be observed that there is no objection to the phrase as applied to the case. But the real value of the phrase may not improperly be said to be, that invitation imports knowledge by the defendant of the probable use by the plaintiff of the article supplied, and therefore carries with it the relation

(1) 2 M. & W. 519; 4 M. & W. 337.

(2) Law Rep. 5 Ex. 1, 5.

(3) 4 C. B. (N.S.) 556; 27 L. J. (C.P.) (N.S.) 318.

(4) Law Rep. 3 C. P. 326.

between the parties which establishes the duty. In *Indermaur* v. *Dames* (1), reliance is again placed upon a supposed invitation of the plaintiff by the defendant. But again, it is hardly possible to state facts which bring a case more completely within the definition of the present judgment. In *Winterbottom* v. *Wright* (2), it was held that there was no duty cast upon the defendant with regard to the plaintiff. The case was decided on what was equivalent to a general demurrer to the declaration. And the declaration does not seem to shew that the defendant, if he had thought about it, must have known, or ought to have known, that the coach would be necessarily or probably driven by the plaintiff, or by any class of which he could be said to be one, or that it would be so driven within any time which would make it probable that the defect would not be observed. The declaration relied too much on contracts entered into with other persons than the plaintiff. The facts alleged did not bring the case within the proposition herein enunciated. It was an attempt to establish a duty towards all the world. The case was decided on the ground of remoteness. And it is as to too great a remoteness that the observation of Lord Abinger is pointed, when he says that the doctrine of *Langridge* v. *Levy* (3) is not to be extended. In *Francis* v. *Cockrell* (4) the decision is put by some of the judges on an implied contract between the plaintiff and the defendant. But Cleasby, B. (p. 515), puts it upon the duty raised by the knowledge of the defendant that the stand was to be used immediately by persons of whom the plaintiff was one. In other words he acts upon the rule above laid down. In *Collis* v. *Selden* (5), it was held that the declaration disclosed no duty. And obviously, the declaration was too uncertain. There is nothing to shew that the defendant knew more of the probability of the plaintiff rather than any other of the public being near the chandelier. There is nothing to shew that the plaintiff was more likely to be in the public-house than any other member of the public. There is nothing to shew how soon after the hanging of the chandelier anyone might be expected or permitted to enter the room in which it was. The

(1) Law Rep. 1 C. P. 274; Law Rep. 2 C. P. 311.
(2) 10 M. & W. 109.
(3) 2 M. & W. 519; 4 M. & W. 337.
(4) Law Rep. 5 Q. B. 184, at p. 501.
(5) Law Rep. 3 C. P. 495.

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facts stated do not bring it within the rule. There is an American case: *Thomas and Wife* (1), cited in Mr. Horace Smith's Treatise on the Law of Negligence, p. 88, note (t), which goes a very long way. I doubt whether it does not go too far. In *Longmeid* v. *Holliday* (2), a lamp was sold to the plaintiff to be used by the wife. The jury were not satisfied that the defendant knew of the defect in the lamp. If he did, there was fraud; if he did not, there seems to have been no evidence of negligence. If there was fraud, the case was more than within the rule. If there was no fraud, the case was not brought by other circumstances within the rule. In *Gautret* v. *Egerton* (3), the declaration was held by Willes, J., to be bad on demurrer, because it did not shew that the defendant had any reason to suppose that persons going to the docks would not have ample means of seeing the holes and cuttings relied on. He does not say there must be fraud in order to support the action. He says there *must be something like fraud.* He says: "Every man is bound not wilfully to deceive others." And then in the alternative, he says: "*or to do any act which may place them in danger.*" There seems to be no case in conflict with the rule above deduced from well admitted cases. I am, therefore, of opinion that it is a good, safe, and just rule.

I cannot conceive that if the facts were proved which would make out the proposition I have enunciated, the law can be that there would be no liability. Unless that be true, the proposition must be true. If it be the rule the present case is clearly within it. This case is also, I agree, within that which seems to me to be a minor proposition—namely, the proposition which has been often acted upon, that there was in a sense, an invitation of the plaintiff by the defendant, to use the stage. The appeal must, in my opinion, be allowed, and judgment must be entered for the plaintiff.

COTTON, L.J. Bowen, L.J., concurs in the judgment I am about to read.

In this case the defendant was the owner of a dock for the

(1) 6 N. Y. 397. (2) 6 Ex. 761; 20 L. J. (Ex.) 430.
(3) Law Rep. 2 C. P. 371, at p. 374.

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repair of ships, and provided for use in the dock the stages necessary to enable the outside of the ship to be painted while in the dock, and the stages which were to be used only in the dock were appliances provided by the dock owner as appurtenant to the dock and its use. After the stage was handed over to the shipowner it no longer remained under the control of the dock owner. But when ships were received into the dock for repair and provided with stages for the work on the ships which was to be executed there, all those who came to the vessels for the purpose of painting and otherwise repairing them were there for business in which the dock owner was interested, and they, in my opinion, must be considered as invited by the dock owner to use the dock and all appliances provided by the dock owner as incident to the use of the dock. To these persons, in my opinion, the dock owner was under an obligation to take reasonable care that at the time the appliances provided for immediate use in the dock were provided by him they were in a fit state to be used—that is, in such a state as not to expose those who might use them for the repair of the ship to any danger or risk not necessarily incident to the service in which they are employed. That this obligation exists as regards articles of which the control remains with the dock owner was decided in *Indermaur* v. *Dames* (1), and in *Smith* v. *London and St. Katharine Docks Co.* (2) the same principle was acted on. I think that the same duty must exist as to things supplied by the dock owner for immediate use in the dock, of which the control is not retained by the dockowner, to the extent of using reasonable care as to the state of the articles when delivered by him to the ship under repair for immediate use in relation to the repairs. For any neglect of those having control of the ship and the appliances he would not be liable, and to establish his liability it must be proved that the defect which caused the accident existed at the time when the article was supplied by the dockowner.

Blackmore v. *Bristol and Exeter Ry. Co.* (3), may be relied on as at variance with the opinion thus expressed by me, but I think that the objection is not well founded. If the plaintiff is to be

(1) Law Rep. 1 C. P. 274; Law Rep. 2 C. P. 311.

(2) Law Rep. 3 C. P. 326.

(3) 8 E. & B. 1035.

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considered as a volunteer there would be no implied request or invitation to him by the defendant to use the dock and the appliances provided. But he was there for the purpose of work, for the due execution of which the defendant received the ship into his dock, and the defendant received payment as remuneration for allowing the work to be done in his dock, and for providing the necessary appliances for enabling it to be done. The plaintiff was therefore engaged in work in the performance of which the defendant was interested, and he cannot be looked upon in the light of a volunteer. Whether the Court was right in *Blackmore's Case* (1) in treating the plaintiff as a volunteer may be a question. But as the ground of the decision is that he was so, that circumstance prevents the case being an authority inconsistent in principle with the conclusion at which I have arrived.

This decides this appeal in favour of the plaintiff, and I am unwilling to concur with the Master of the Rolls in laying down unnecessarily the larger principle which he entertains, inasmuch as there are many cases in which the principle was impliedly negatived.

Take for instance the case of *Langridge* v. *Levy* (2), to which the principle if it existed would have applied. But the judges who decided that case based their judgment on the fraudulent representation made to the father of the plaintiff by the defendant. In other cases where the decision has been referred to judges have treated fraud as the ground of the decision, as was done by Coleridge, J., in *Blackmore* v. *Bristol and Exeter Ry. Co.* (1); and in *Collis* v. *Selden* (3), Willes, J., says that the judgment in *Langridge* v. *Levy* (2), was based on the fraud of the defendant. This impliedly negatives the existence of the larger general principle which is relied on, and the decisions in *Collis* v. *Selden* (3), and in *Longmeid* v. *Holliday* (4) (in each of which the plaintiff failed), are in my opinion at variance with the principle contended for. The case of *George* v. *Skivington* (5), and especially what is said by Cleasby, B., in giving judgment in that

(1) 8 E. & B. 1035.
(2) 2 M. & W. 519; 4 M. & W. 337.
(3) Law Rep. 3 C. P. 495.
(4) 6 Ex. 761; 20 L. J. (Ex.) 430.
(5) Law Rep. 5 Ex. 1.

case seem to support the existence of the general principle. But it is not in terms laid down that any such principle exists, and that case was decided by Cleasby, B., on the ground that the negligence of the defendant which was his own personal negligence was equivalent, for the purposes of that action, to fraud on which (as he said) the decision in *Langridge* v. *Levy* (1) was based.

In declining to concur in laying down the principle enunciated by the Master of the Rolls, I in no way intimate any doubt as to the principle that anyone who leaves a dangerous instrument, as a gun, in such a way as to cause danger, or who without due warning supplies to others for use an instrument or thing which to his knowledge, from its construction or otherwise, is in such a condition as to cause danger, not necessarily incident to the use of such an instrument or thing, is liable for injury caused to others by reason of his negligent act.

For the reasons stated I agree that the plaintiff is entitled to judgment, though I do not entirely concur with the reasoning of the Master of the Rolls.

Judgment reversed.

Solicitor for plaintiff: *E. J. Anning.*
Solicitors for defendant: *Watsons, Son, & Room.*

(1) 2 M. & W. 519; 4 M. & W. 337.

W. P.

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June 8.

[IN THE COURT OF APPEAL.]

WEBB *v.* STENTON AND OTHERS, GARNISHEES.

Attachment of Debts—Income from Trust Fund—"Debt owing or accruing"—Order XLV., r. 2.

A judgment debtor was entitled for his life to the income arising from a fund vested in trustees, payable half-yearly in February and August. Upon application by the judgment creditor in November for a garnishee order attaching the debtor's share of the income in the hands of the trustees, it appeared that the last half-yearly payment had been made, and that there was no money the proceeds of the trust property in the hands of the trustees:—

Held, affirming the decision of the Queen's Bench Division, that there was no debt "owing or accruing" at the time when the order was applied for which could be attached under Order XLV., rule 2.

Semble, that the proper course for the judgment creditor to pursue was to apply for the appointment of a receiver, under the practice of the Chancery Division.

SPECIAL CASE.

In August, 1882, John Hulton, against whom the plaintiff had obtained a judgment for debt and costs, became entitled under the will of the Rev. C. Fletcher, deceased, for his life to one-fourth of one-fourth share of the income arising from the trust fund under the will, of which the defendants were trustees. The value of this interest of Hulton's was about 85*l.* yearly, and was payable half-yearly in February and August.

By indenture of mortgage of the 31st of October, 1882, Hulton assigned his interest under the will to J. R. Allen, of Nottingham, for securing the repayment of 300*l.*, with interest at the rate of 5 per cent.

A payment of 60*l.* had been made to him on account of his share of the income due to him, in consequence of expenses he had been put to by the illness and death of his wife.

Copies of the will and mortgage formed part of the case.

The question for the Court was whether the interest to which John Hulton became entitled under the will was attachable under Order XLV., rule 2, on the 11th of November, 1882.

Castle, for the plaintiff. The debtor's interest in the trust fund

can be attached under Order XLV., rule 2. The fact that he has mortgaged his interest under the will does not prevent his equity of redemption from being the subject of an attachment: *Hirsch* v. *Coates*. (1)

[CAVE, J. You have to make out that there is "a debt due or accruing" from the trustees.]

In re Cowans' Estate (2) shews that the income of a trust fund payable to the debtor by a trustee under a settlement can be attached under Order XLV., and is in all respects a stronger case than the present.

V. Smith, for the defendants, was not heard.

CAVE, J. I cannot see that the debtor's interest in the trust fund was a debt due or accruing to him from the trustees. The case relied on by the plaintiff, *In re Cowans' Estate* (2), no doubt at first sight appears to be an authority for the proposition that the debtor's interest under this fund can be the subject of an attachment. But the question whether the debtor's interest can be taken to be a "debt" due to him from the trustees within the meaning of the order does not appear to have been fully argued. I cannot think that the liabilities of trustees in a case like the present were meant to be ascertained by garnishee proceedings. A more simple course is for the plaintiff to apply for the appointment of a receiver, which would give him all that he seeks to obtain by the present order.

DAY, J., concurred.

Judgment for the defendants.

A. P. S.

The plaintiff appealed.

Lumley Smith, Q.C., and *Castle*, for the plaintiff. The rules under Order XLV. for the attachment of debts are similar to the garnishee clauses of the Common Law Procedure Act, 1854, except that the debt to be attached is enlarged so as to include an equitable debt, whereas the debt attachable under the Common Law Procedure Act must have been a legal one. There is no

(1) 18 C. B. 757. (2) 14 Ch. D. 638.

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distinction now since the Judicature Acts between a legal and equitable debt, and Order III., rule 6, enables a specially indorsed writ to be issued by a cestui que trust against his trustee for a liquidated demand due on a trust: *Wilson* v. *Dundas* (1), where there was an application to Quain, J., at chambers to attach half a year's salary due to a judgment debtor from his trustees, and that learned judge, after pointing out that there was no longer any distinction between a legal and equitable debt, said, "the debt need not be due, as the words of Order XLV., rule 2, are 'debts owing or accruing.'"

In *Nash* v. *Pease* (2) a garnishee order was allowed under Order XLV., rule 2, to attach a portion of an annuity to which the judgment debtor was entitled under a will, of which the garnishees were the trustees. Seton on Decrees (vol. i., p. 312, 4th ed.), gives the forms, in which the late Master of the Rolls made at chambers an order nisi, and absolute, for attaching money which might thereafter come to the hands of trustees in respect of the judgment debtor's share of an income under a will.

[FRY, L.J. The difficulty here is that the plaintiff asks for an order to attach when there is nothing due and may never be due from these trustees to the judgment debtor.]

It is not an order to pay, and if no money comes into the hands of the trustees for the judgment debtor the order will have no operation. In *Tapp* v. *Jones* (3) it was held that an order might be made under s. 61 of the Common Law Procedure Act, 1854, not only attaching an accruing debt in the hands of the garnishee, but also for payment of the accruing debt when it should become payable by the garnishee. That case was approved of by Hall, V.C., in *In re Cowans' Estate* (4), which is directly in point, and there the Vice-Chancellor said that the order for attachment under Order XLV., rule 2, was not confined to what was due and payable at the time the order was made, but extended to what might subsequently be received by the trustee, who in that case was a receiver appointed in an administration action. In *Chapman* v. *Biggs* (5) an order had been made by a

(1) Weekly Notes, Dec. 4, 1875, p. 232.
(2) 47 L. J. (Q.B.) 766.
(3) Law Rep. 10 Q. B. 591.
(4) 14 Ch. D. 638.
(5) Ante, p. 27.

master to attach moneys in the hands of trustees which formed part of the income of trust funds payable to a married woman, and though that order was set aside on appeal, it was solely on the ground that it was in contravention of a clause in the will creating the trust which restrained anticipation. Here a judgment debtor could sue the trustees for the annuity if it was improperly withheld: *Wilson* v. *Rhodes* (1), and that is a test that the garnishee order ought properly to be made.

A. Charles, Q.C., and *V. Smith*, for the defendants. There was nothing due to the judgment debtor from the trustees at the time this order was obtained; in fact he was overpaid, having got an advance. The attempt by the plaintiff in this case is to attach future moneys which have not yet come, but which may or may not come, into the hands of the trustees applicable to the trust in favour of the judgment debtor. Such future moneys are not attachable; they are not debts within the meaning of Order XLV., rule 2.

[BRETT, M.R. What do you say is the meaning of "debts owing or accruing?"]

The same expression "debt owing or accruing" occurs in s. 61 of the Common Law Procedure Act, 1854, and in *Jones* v. *Thompson* (2) Wightman, J., and Crompton, J., were of opinion that it only applied to debitum in presenti, solvendum in futuro. There must therefore be an actual debt existing at the time the order for attachment is made, though it need not be then payable. Lord Blackburn, then Blackburn, J., in *Tapp* v. *Jones* (3), does not mean to differ from what was so stated in *Jones* v. *Thompson* (2), and when he says that he sees no reason why the sections and rules under the Common Law Procedure Act for enforcing the claim against the garnishee "should not be made to take effect when the debt becomes due," he means when it becomes payable. The opinions of Wightman, J., and Crompton, J., as to "debt owing or accruing" in *Jones* v. *Thompson* (2) were expressly approved of and adopted by the Queen's Bench Division in *Hall* v. *Pritchett* (4), where it was held that salary which was

(1) 8 Ch. D. 777.
(2) E. B. & E. 63; 27 L. J. (Q.B.)
(3) Law Rep. 10 Q. B. 591.
(4) 3 Q. B. D. 215.

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then not payable could not be attached under Order XXIV., rule 4, of the County Court Rules, 1875, because it was not "a debt due, owing, or accruing."

Castle, replied.

BRETT, M.R. In this case the judgment creditor sought to attach certain moneys in the hands of the trustees of the judgment debtor, alleged to be debts, or accruing debts, from the trustees to the judgment debtor.

Now the relation between the trustees and the judgment debtor was this—the judgment debtor was entitled, as cestui que trust, to a share of the proceeds of certain property, which would, if it came at all into the hands of the trustees, come half yearly. It seems to me that there was nothing else which could be called a debt, and that at the time when the order was applied for there was no money, the proceeds of this property, in the hands of the trustees. It is true that if everything went on well, at the next half year there would come into the hands of the trustees money from the proceeds of this property, and a share of that would be payable from the trustees to the judgment debtor, the cestui que trust.

The question is, whether, under these circumstances the judgment creditor can obtain the garnishee order sought for. The Divisional Court refused to make the order on the ground that there was no debt due, or accruing debt, at the time when the order was applied for which could be attached under Order XLV., rule 2, of the Judicature Act, and I am of opinion that the decision of the Divisional Court was right.

It is necessary to look at the words of Order XLV., rule 2. [His Lordship here read that rule.]

It seems to me upon the plain reading of rule 2 of Order XLV. that no order can be made unless some person at the time the order is made is indebted to the judgment debtor. If there be a person so indebted, then the order will be that all debts owing or accruing from such person to the judgment debtor shall be attached. If there is a debt due payable in presenti, of course an order may be made to attach that debt. If there is not a debt payable in presenti, but there is a debt in

existence, debitum in presenti, but payable in futuro, it seems to me that such an order could be made with regard to that debt, although it be the only debt and there is no debt payable in presenti, because such third person is indebted to the judgment debtor, and that would satisfy the words of the rule.

In the present case the statement of the special case shews there is no debt payable in presenti, and therefore the question comes to be whether that which is sought to be attached is an accruing debt within Order XLV., rule 2, and that casts upon us the duty of saying what is the meaning of "accruing debt" in this rule 2.

Now can it mean any debt which may at any future time arise between the judgment debtor and the person sought to be made a garnishee, there being no contract at that time between the judgment debtor and such person, or anything which can make any relation of any kind, legal or equitable, between them? To state the proposition is to shew its absurdity. Then can it be this, that it may be a debt which there is some probability may in future arise? Who can say where there is nothing out of which a debt can be said in law to arise, that it is probable that a debt may arise, as for instance a probability that the parties will make a contract. If it is not a debt it will not do. It must be something which the law recognises as a debt. In the former statute, viz., the Common Law Procedure Act, 1854, as well as in this rule, it is called an accruing debt, and in 1858, in the case of *Jones* v. *Thompson* (1), the judges of the Queen's Bench thus construed the words "a debt owing or accruing" in s. 61 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), Crompton, J., said: "I myself at chambers have always acted on the supposition that the garnishee clauses apply only to cases in which there is an existing debt, though it may be only accruing. On that principle I have refused to make orders attaching rent before it became due, and instalments of an annuity not yet due, because they were not yet debts." Wightman, J., said, "Mr. Prentice relies on the words 'or accruing,' but I think that these words are intended to apply to those cases in which there is debitum in presenti, solvendum in futuro. I think that, to bring

(1) E. B. & E. 63; 27 L. J. (Q.B.) 234.

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the case within the statute, there must be a debt, though it need not be yet due." Again, Crompton, J., there said: "There must, under this Act, be a debt as much as in bankruptcy. I do not agree that the use of the word 'accruing' makes a distinction on this point; there must be a debt, though it may be not yet due. I have always acted on the principle that it is not enough to shew that it is very probable that there soon will be a debt, but that it must be shewn that there is a debt, though it need not be yet due." I cannot conceive anything more clear and decisive than that, and if we are to construe "accruing debt" in this case in any other sense than that, it is obvious that we must overrule that decision, and say that it was wrong.

Then in the case of *Tapp* v. *Jones* (1) there is the following opinion of Blackburn, J., now Lord Blackburn, on this 61st section of the Common Law Procedure Act, 1854, "It is evident that the legislature had in view both present debts and future debts, debita in presenti, solvenda in futuro, for it speaks in the earlier part of the section of debts owing and accruing." There again it is obvious that in 1875 that learned judge construed the words "accruing debt" to mean a debt debitum in presenti, solvendum in futuro. Now that is a debt known to the law and which the law has always recognised. The law has always recognised as a debt two kinds of debt, a debt payable at the time, and a debt payable in the future, and unless the legislature intended to invent a new kind of debt not known to the law, "accruing debt" can only be what the judges have so stated. It is impossible to conceive that the Common Law Procedure Act, 1854, or this Order XLV., rule 2, which follows it, and which was drawn after these decisions had been given, intended to invent a new kind of debt, but on the contrary it is clear to my mind that the judges who drew this rule 2, and the Parliament which afterwards sanctioned it, intended to put the same meaning on the words "debts owing or accruing" as was put on them by the judges in the well-known decisions upon s. 61 of the Common Law Procedure Act, 1854. Therefore it seems to me that the meaning of "accruing debt" in Order XLV., rule 2, is debitum in presenti, solvendum in futuro, that it goes no further, and that it does not

(1) Law Rep. 10 Q. B. 591.

comprise anything which may be a debt however probable and however soon it may be a debt. That is the construction which I put upon this rule.

Then comes the question whether there are any cases which are in contradiction to that.

Now there is the case of *In re Cowans' Estate* (1) before Hall, V.C. I am not at all inclined to say that the order in that case was not a right order, because it seems to me that there was a debt then due, and it is immaterial whether the debt was a legal or equitable one. If there was an existing debt the order to attach was good, and it would not be void because it went on to attach an accruing debt which did not exist and which it could not attach. But though I am not prepared to say that that order was not good, yet I cannot help seeing, as far as I can understand the case, that the learned judge considered that something might be an accruing debt within Order XLV., rule 2, which was neither a legal or equitable debt at the time, not debitum in presenti, and if he did, then to that extent I am not able to agree with him.

We then had pointed out to us the form of an order in Seton, which is stated to have had the concurrence of the late Master of the Rolls. There are two forms, it appears, and I will leave what observations are to be made on them to my learned brethren here, who are more conversant with that subject than I am; but I do not see that it can be said that we differ in what we now decide from any decision of the late Master of the Rolls if he did agree with those forms, or with either of them.

Therefore, for the reasons I have given, I put the interpretation I have mentioned on "accruing debt" in this rule 2, and then the only question is whether that which is attempted to be attached here is an accruing debt according to such interpretation It is obvious it is not. There is a sum of money which is to be payable out of the proceeds of property when it comes to the hands of the trustees. Nobody can say that until then it is in any legal or equitable sense a debt which is debitum in presenti. The money may never come to these trustees without any fault of their own, for they may die or cease to be trustees before anything can become due. Therefore there are contingencies

(1) 14 Ch. D. 638.

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upon which no debt may ever arise, and all that can be said of it is, that it is probable that at the end of half-a-year money will come into the hands of the trustees, but until it does come into their hands, there is no debt existing between them and their cestui que trust. There may probably be other remedies by which the creditor of the judgment debtor can get relief, but in my opinion he cannot, in the case now before us, get relief under Order XLV., rule 2.

Therefore I am of opinion that the judgment of the Divisional Court was right, and that this appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. The question is one of very considerable importance, especially as our decision is likely, we are told, to disturb the practice, in chambers at least, of the Chancery Division, if not of the Common Law Division.

The question turns upon the true construction of Order XLV., rule 2, the language of which is substantially the same as that of the corresponding section in the Common Law Procedure Act, 1854, relating to the attachment of debts.

[The Lord Justice here read rule 2 of Order XLV.]

The important point is that the affidavit must shew that the third person, called the garnishee, is indebted to the judgment debtor, and that the subject-matter to be attached is a debt "owing or accruing" from the garnishee.

Now, I quite agree that the word "debt" in this order includes not only what was a common law debt before the passing of the Judicature Act, but also what was a mere equitable debt, that is to say a liquidated sum of money owing in equity from one person to another. I do not doubt that the power of attachment is extended to equitable debts. But is a trustee a debtor to his cestui que trust? You cannot say he is unless he has got in his hands money which it is his duty to hand over to the cestui que trust; then of course he is a debtor and there is no difficulty in attaching such a debt under this Order. But take the case of a trustee of consols for me for my life. Is he in any proper sense my debtor so long as he has no dividends which are payable to me? Clearly not, he individually may never receive those dividends; there may be a change of trustees before the next dividend day.

You cannot possibly say that a trustee is a debtor to the cestui que trust before he has, or but for some fault of his might have had, the money which it is his duty to hand over. Suppose my trustee were to become bankrupt, I could not prove against his estate for unreceived dividends accruing to me as his cestui que trust. If he has made away with my money it is another matter. So, if he has made himself my debtor, I can prove my debt; but as long as the trust fund remains intact neither the fund nor the right to receive the income of it passes to his trustees in bankruptcy.

Those matters I thought it necessary to observe upon, because they strike at the root of the whole question.

Now, let us consider the language of Order XLV., rule 2. I should say, apart from any authority, that a debt legal or equitable can be attached whether it be a debt owing or accruing; but it must be a debt, and a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in presenti, solvendum in futuro.* An accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation. That appears to me to be the view taken by the judges in the cases under the Common Law Procedure Act, 1854, to which the Master of the Rolls has referred, and I will not allude to it further.

I will pass on to the decision of Vice-Chancellor Hall in *In re Cowans' Estate* (1), which I cannot read without seeing that under Order XLV., rule 2, he was disposed to attach money coming to the cestui que trust from his trustee. The primary point in that case which he had to decide was whether money payable by a receiver, or by anybody in that position, was a debt attachable. He decided that it was, and to that extent his decision I think was right. But then the Vice-Chancellor certainly considered the question whether under Order XLV., rule 2, there was power to attach moneys to become due from a receiver to the judgment debtor, and he came to the conclusion that there was, and he seemed to assume that an order could be made to attach moneys payable to the cestui que trust in the future as distinguished from moneys actually in the hands of the

(1) 14 Ch. D. 638.

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trustee. To that extent, in my opinion, his decision cannot be supported.

Now, we have been also referred to the forms in 1 Seton (4th ed.), page 312. The first form is the garnishee order nisi. [The Lord Justice here read the order.] In point of form that order seems unobjectionable. It is in form "all debts due and owing or accruing due." If there were none, of course the order would be inoperative. But when we look at the order absolute we find a complete departure from the form of the order nisi. The order absolute runs thus, "It is ordered that the defendant C. A., and the said S. the garnishee, do pay any sum or sums of money now in or hereafter to come to their hands as trustees of the will." Whether its intention was to extend the power to attach I do not know, for I do not know the circumstances under which it was made; but as a matter of form, the order nisi is right, and the order absolute wrong.

The result seems to me to be this: you may attach all debts, whether equitable or legal; but only debts can be attached; and moneys which may or may not become payable from a trustee to his cestui que trust are not debts.

Therefore I am of opinion that the decision of the Divisional Court was right, and this appeal must be dismissed.

FRY, L.J. I agree in the conclusion which has been arrived at by the other members of the Court.

The rule which we have to construe is rule 2 of Order XLV., and the material words are these: "The Court or a judge may," "upon affidavit" "that any other person is indebted to the judgment debtor and is within the jurisdiction, order that all debts owing or accruing from such third person (hereinafter called the garnishee) to the judgment debtor shall be attached."

In my opinion the defendants' counsel is right in contending that the words there, "is indebted," and the words "debts owing or accruing" refer to the same subject matter. It appears to me to be plain that to satisfy either of those two expressions there must be an actual present debt. I think further that the debt may be either equitable or legal. No doubt, under the Common Law Procedure Act, 1854, it has been held that the debt referred

to must be a legal debt, because that statute was dealing only with the Courts of Common Law. But when the word "debt" is used in the Judicature Acts or Orders, which deal with a new Court which has the jurisdiction of both the Courts of Common Law and Equity, a meaning must be given to the word "debt" which is co-extensive with such jurisdiction. I have further no doubt that the word "indebted" describes the condition of a person when there is a present debt, whether it be payable in presenti or in futuro, and I think that the words "all debts owing or accruing" mean the same thing. They describe all debita in presenti, whether solvenda in futuro, or solvenda in presenti. The material question which has been argued before us is this: does the meaning go further, and does it include debts which may hereafter arise? If they may hereafter arise, it is possible also they may not hereafter arise, and it would require explicit words to include such future possible debts. Such a meaning appears to me to be excluded not merely by this rule 2, but by rule 3, which is this: "Service of an order that debts due or accruing to the judgment debtor shall be attached, or notice thereof to the garnishee in such manner as the Court or judge shall direct, shall bind such debts in his hands." Now, it is impossible to say that a debt is in the garnishee's hands when the debt does not exist. The 4th rule would equally lead me to the same conclusion. It says execution may be ordered if the garnishee "does not dispute the debt due or claimed to be due from him to the judgment debtor." But to say that a man can be called upon to dispute a debt which it is admitted does not exist, appears to me to be very absurd, and yet that would be the effect of rule 4, if the words "debts accruing" in rule 2, included a debt which did not exist. The two decisions of *Jones* v. *Thompson* (1), and *Tapp* v. *Jones* (2), are not at unison with the language of Vice-Chancellor Hall in *In re Cowans' Estate* (3), where he says: "I consider therefore that the words of rule 2, Order XLV., 'debts owing or accruing,' though they have been limited in construction by some authorities, ought not to be restricted so as to exclude such a fund as this—that is,

(1) E. B. & E. 63; 27 L. J. (Q.B.) 234. (2) Law Rep. 10 Q. B. 591.
(3) 14 Ch. D. 638, at p. 643.

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income ascertained to be the debtor's property during the whole of her life. To say that it should not be attached would be to leave her at liberty to deal with the future income by selling it, or mortgaging it. I cannot hold that such a construction of the rules would be the right one; on the contrary, I hold that the order nisi, which has been obtained rightly, extended not only to the moneys actually in the hands of the receiver, if there were any at the time when it was made, but to future payments as well." For the reasons I have already given, I cannot agree with what the Vice-Chancellor there held, and I adopt the construction put on the words "owing, or accruing" by the Court of Queen's Bench in the two cases referred to.

With regard to the forms of order in Seton, to which we were referred, I may observe that though they are of great importance as guides, they were made only at chambers, and have never undergone discussion in Court, and are therefore of much less force, notwithstanding they may have been made by so eminent a judge as the late Master of the Rolls.

The only inquiry now is whether in the present case it has been shewn that what is sought to be attached is a present debt, payable now or in the future. There is clearly no debt payable at the present time. Is there any debt payable in futuro? A trustee is not, in my opinion, an equitable debtor to the cestui que trust until there is money in his hands which he ought to pay to his cestui que trust, or until he has made himself personally liable to pay money to his cestui que trust by reason of some breach of trust or default in the performance of his duties as trustee. Now in the special case there is no suggestion of there being any money in the hands of the trustees divisible among the cestuis que trust. On the contrary, the facts stated with regard to the income of 85*l.* a year, the times of payment, and the advance already made, shew that the cestui que trust, the judgment debtor, was over paid and not under paid at the date of the order.

Therefore I am of opinion that the decision of the Divisional Court was perfectly correct, and that the appeal must be dismissed.

I will make one more observation only. It appears to me that in arriving at this conclusion we are not laying down any rule

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which will produce a defect in the administration of justice. I think the power of the judgment creditor to obtain a receiver under the practice of the Chancery Division is adequate to meet all that may be required, and will prevent any denial of justice.

LINDLEY, L.J. I quite concur in the last observation Lord Justice Fry has made.

Appeal dismissed.

Solicitors for plaintiff: *Cobbold & Woolley.*

Solicitors for defendants: *G. H. Carthew,* for *Stenton, Son, & Metcalfe, Southwell.*

W. P.

[IN THE COURT OF APPEAL.]

May 10.

THE MERSEY STEAMSHIP COMPANY *v.* SHUTTLEWORTH & Co.

Practice—Admission on Pleadings—Claim, Admission of—Counter-claim—Rules of Supreme Court, 1875, *Order XIX., r.* 3; *Order XL., r.* 11.

In an action for a liquidated demand the defendants pleaded admitting the claim, but setting up a counter-claim for unliquidated damages to a greater amount.

The Court refused an application under Order XL., rule 11, for an order to sign judgment for the plaintiffs upon the claim, and for payment of the amount thereof by the defendants into court to abide the result of the action.

Judgment of the Queen's Bench Division (10 Q. B. D. 468) affirmed.

ACTION for freight of goods.

By the statement of defence the defendants admitted that the sums claimed in the writ became and were due to the plaintiffs, subject to the set-off and counter-claim thereinafter mentioned; and by way of set-off and counter-claim the defendants claimed damages exceeding the amount of the claim against the plaintiffs for breach of the terms of a contract to carry certain cargo on board a vessel of the plaintiffs from and to certain ports specified in such contract.

The Queen's Bench Division (Watkin Williams and Mathew, JJ.), having refused to grant leave to the plaintiffs to sign judgment under Order XL., rule 11 (1), the plaintiffs appealed.

Gainsford Bruce, for the plaintiffs. The plaintiffs' claim is

(1) 10 Q. B. D. 468.

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admitted; they ought to have judgment for the amount due to them, and the money ought to be brought into court. *Showell* v. *Bowron* (1) is on all fours with the present case; it is a strong authority in support of the plaintiffs' application.

Hollams, for the defendants, was not called upon to argue.

COTTON, L.J. This is an appeal from a decision of the Queen's Bench Division refusing to grant an order that the plaintiffs shall be at liberty to sign judgment upon the claim, and that the amount thereof shall be paid into Court by the defendants to remain there until all questions in the cause shall have been determined. Order XL., rule 11, allows relief to be given; but the granting of the relief is subject to the discretion of the Court. The orders and the rules under the Judicature Acts ought to be construed with reference to one another, and we must not overlook the rules as to counter-claims. I by no means say that a counter-claim will in every case prevent an order for payment into court being made under Order XL., rule 11: if the counter-claim is frivolous and unsubstantial, an order of that kind may be made. When this case was before the Queen's Bench Division reference was made to Order XIX., rule 3: I think that full effect must be given to that rule. The contention for the present plaintiffs is that whenever the claim of a plaintiff is admitted, he is entitled to have the money paid into court. I cannot agree to that argument; a plaintiff is not entitled to have the money paid into court, unless the counter-claim is frivolous and unsubstantial. I agree with the reasons and with the judgment of the Queen's Bench Division. In *Showell* v. *Bowron* (1) there may have been some special reason for granting the order, and in that case the decision will be right; but it seems to me that if the decision cannot be supported upon that ground, it was wrong.

BOWEN, L.J., concurred.

Appeal dismissed.

Solicitors for plaintiffs: *Flux, Son, & Co.*

Solicitors for defendants: *Hollams, Son, & Coward.*

(1) Weekly Notes, March 17, 1883, p. 50.

J. E. H.

[IN THE COURT OF APPEAL.]

1883
April 25.

HUNNINGS *v.* WILLIAMSON. (1)

Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 54, 60—*Vestry—Member interested in Contract—Acting as Member—Penalty—Evidence—Minute-book.*

The brother of the defendant entered into a contract with a vestry constituted under the Metropolis Management Act, 1855, and in order to enable him to carry it out, borrowed money from the defendant, who by way of security took an assignment of the contract. Afterwards the defendant was elected a member of the vestry. An action for penalties having been brought against the defendant for acting as member of the vestry, an attendance-book of the members signed by the defendant and the minute-book of the vestry containing his name as a member in attendance were put in as evidence at the trial:—

Held, that s. 54 of the Metropolis Management Act, 1855, applied to contracts made as well before as after the election of a member, and that the defendant was "interested" in the contract in question within the meaning of that section; that there was evidence under s. 60 that the defendant had acted as member of the vestry; and that he was liable to penalties for having acted after he had "ceased" to be a member.

ACTION to recover penalties from the defendant under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 54, for having acted as a vestryman, after ceasing to be a vestryman by reason of being interested in a contract with the vestry of which he was a member. The action was tried before Pollock, B., when the following facts were proved:

In March, 1882, the defendant's brother entered into a contract to do work for the vestry of St. Mary, Islington: the brother, being in need of funds to carry out the contract, borrowed money from the defendant, and by way of security assigned the benefit of the contract to him. In May, 1882, the defendant was elected a member of the vestry: an attendance-book of the members was kept, and this was signed five times by the defendant as a member attending the meetings of the vestry. The minute-book of the vestry, which contained the names of the members who signed the attendance-book, was also produced, and this book

(1) This case has been reported on another point at a previous stage, 10 Q. B. D. 459.

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was duly attested pursuant to the Metropolis Management Act, 1855, s. 60. At the trial the jury found a verdict for the plaintiff for 250*l.*, being the amount of five penalties of 50*l.* each.

The Queen's Bench Division having refused a rule for a new trial on the ground of misdirection,

Talfourd Salter, Q.C., moved by way of appeal. The learned judge was wrong in leaving any question to the jury. First, the defendant did not "cease" to be a member of the vestry; from the very words of s. 54 (1) of the Metropolis Management Act, 1855, it is plain that it applies only to contracts made after a member is elected; in the present case the contract in question was entered into before the defendant was elected. *Fletcher* v. *Hudson* (2) is distinguishable, and was decided on a different statute. Secondly, there was no evidence that the defendant acted as a member of the vestry; there was no evidence that he attended the meetings of the vestry for the purpose of transacting business. Thirdly, the defendant was not "interested" in the contract within the meaning of s. 54: he was not a party to it either as agent, or principal whether disclosed or undisclosed: he had merely lent money to his brother to enable him to carry it out. The statute being penal, ought to be construed strictly.

BRETT, M.R. This action is brought under the Metropolis Management Act, 1855, s. 54, upon the allegation that the defendant being the member of a vestry became interested in a contract with that vestry, and yet continued to act as member thereof, whereby he incurred penalties.

The first objection relied upon is that the 54th section does not extend to the present case, because it applies only when a member is interested in a contract made after his election, and

(1) By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 54, "in case any member . . . . of any vestry . . . . in any manner be concerned or interested in any contract or work made with or executed for such . . . . vestry, in every such case such person shall cease to be such member, ... and any person who acts as a member of any such . . . . vestry . . . . after ceasing to be such member . . . . shall for every such offence be liable to a penalty of 50*l.*, which may be recovered by any person who may sue for the same in any of the superior courts of law, with full costs of suit."

(2) 7 Q. B. D. 611.

does not apply when he is interested in a contract made before he became a member. The defendant is not within any other section of the statute, and it is difficult to suppose that he does not fall within this. But how do the words of s. 54 stand? They are: "such person shall cease to be such member." There is no limitation: it is not enacted that the section shall apply only to future contracts: the section does not in express terms prevent the electors from electing a person interested in a contract made with the vestry; nothing shews that the votes are to be thrown away: it follows that if a person is elected a member in point of fact, and at or after the time of his election he is interested in a contract made with the vestry, he ceases to be a member, and the election must be held again. A person interested in a contract ceases to be a member the moment after he is elected. This objection is not valid. The present case falls within the statute. The defendant was interested in a contract with the vestry: this was quite lawful so long as he was not a vestryman; but he ceased to be a member within the meaning of s. 54, and nevertheless after ceasing to be a member he acted as a member. He therefore incurred the penalty.

It was further objected that there was no evidence that the defendant acted as a member. It appears that a book was kept by the vestry for the purpose of shewing what members attended the meetings, and there was evidence that the defendant did attend those meetings, because the book was signed by the defendant. The minute-book of the vestry was put in, and this was not signed by the defendant. I am inclined to think that the attendance-book was in itself evidence that the defendant had acted as a member of the vestry. But the minute-book kept pursuant to s. 60 (1) was properly admitted for the purpose of

(1) By the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 60, "Entries of all proceedings of the Metropolitan Board of Works and every such district board, and of any such vestry, with the names of the members who attend each meeting, shall be made in books to be provided and kept for that purpose, under the direction of the board or vestry, and shall be signed by the members present, or any two of them; and all entries purporting to be so signed shall be received as evidence, without proof of any meeting of the board or vestry having been duly convened or held, or of the presence at any such meeting of the persons named in any such entry as being present thereat, or of such persons being members of the

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shewing that the transactions therein mentioned actually took place. That section enacts that the entries in the minute-book "shall be received as evidence without proof," amongst other things, "of the presence at any such meeting of the persons named in any such entry as being present thereat." The words of the section do not in express terms point out of what the minute-book is to be evidence; but it is obvious that the legislature intended that the minute-book should be used as evidence that what is therein stated actually took place. The minute-book has been put in as part of a chain of circumstances shewing whether or not the defendant acted as member. I think that the two books taken together are evidence of acts done at the meetings of the vestry, and also are evidence that the defendant acted as a member of the vestry.

A third objection urged was that there was no sufficient evidence, that the defendant was "interested" in a contract made with the vestry. Under s. 54, in order to render the defendant liable, he must have been "concerned or interested in" some "contract or work made with or executed for such .... vestry." In the present case we have to consider whether the defendant was interested in a contract within the meaning of s. 54. It has been contended that as the defendant merely lent money to his brother in order to enable him to carry out the contract, and merely took an assignment of it by way of security for repayment of his loan, he was not "interested" in the contract; but surely it was much to the defendant's "interest" to promote the fulfilment of the contract, in order that he might obtain repayment of the money which he had advanced. I think that the defendant was "interested" in the contract within the meaning of s. 54.

BOWEN, L.J., concurred.

Rule refused.

Solicitors for defendant: *Clapham & Fitch.*

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board or vestry, or of the signature of any person by whom any such entry purports to be signed, all which matters shall be presumed until the contrary be proved."

J. E. H.

[IN THE COURT OF APPEAL.]

1883
June 28.

DAVIS *v.* BURTON.
BLAIBERG, CLAIMANT.

Bill of Sale—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *ss.* 7, 9—*Instrument not in accordance with the Form given by the Act.*

The Bills of Sale Act (1878) Amendment Act, 1882, s. 9, provides that a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void, unless made in accordance with the form in the schedule to the Act annexed.

The Act also provides (s. 7) that personal chattels assigned under a bill of sale shall not be liable to be seized by the grantee for any other than the following causes, viz., amongst others: 1. If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security. 2. If the grantor shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes. 4. If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his receipts for rent, rates, and taxes.

By a bill of sale the grantor assigned to the grantee the goods enumerated in the schedule thereto, by way of security for the payment of 300*l.* money advanced and 180*l.* for agreed capitalised interest thereon at the rate of 60 per cent. per annum, making together the sum of 480*l.*, by instalments of a certain amount, at certain specified dates. The grantor also covenanted, amongst other things, that she would deliver to the grantee the receipts for rent, rates, and taxes, in respect of the premises on which the goods assigned might be, when demanded "in writing or otherwise;" and also that she would not make any assignment for the benefit of creditors, or file a petition for liquidation or composition with creditors, or do or suffer anything whereby she should render herself liable to be made or become a bankrupt. It was also by the said bill of sale agreed, that if the grantor should break any of the covenants, all the moneys thereby secured should immediately become due and be forthwith paid to the grantee, and it was provided that the chattels assigned should not be liable to seizure for any other cause than those specified in the Bills of Sale Act (1878) Amendment Act, 1882:—

Held, that the bill of sale was void, as not made in the form given in the schedule:—

Held, also, that the bill of sale could not be supported, inasmuch as it enabled the grantee to seize the goods upon a failure by the grantor to produce the receipts for rent, rates, and taxes, after a verbal demand.

Judgment of the Queen's Bench Division (10 Q. B. D. 414) affirmed.

APPEAL by the claimant from the judgment of the Queen's Bench Division (Cave and Day, JJ.), upon a special case in favour of the execution creditor.

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The facts are fully stated in the report of the proceedings before the Queen's Bench Division (1), and may be gathered from the above head-note.

June 27, 28. *Winslow, Q.C.*, and *A. T. Lawrence*, for the claimant. It is provided by the Bills of Sale Act (1878) Amendment Act, 1882, s. 7, sub-s. 1., that the grantee may seize the chattels assigned by a bill of sale for non-performance of a covenant necessary to the maintenance of the security. In the present case the covenants, including that for the production of the receipts for the rent, rates, and taxes, when demanded "in writing or otherwise," were necessary to the maintenance of the security; and the parties could lawfully agree that upon the failure to perform any one of them, the whole amount secured by the bill of sale should become due, and in that case the goods might be lawfully seized under s. 7, sub-s. 1: this construction is not inconsistent with the provisions of sub-s. 4. If the contention for the execution creditor is upheld, no bill of sale will be good which provides for the payment of interest by instalments. Chitty, J., in *Wilson* v. *Kirkwood* (2), appeared to think that a bill of sale very similar in form to that now before the Court was valid; he pointed out that the language of s. 9 did not require the form given in the schedule to be literally adopted. It is true that under the terms of this bill of sale a demand for payment may be made immediately after the execution of the bill of sale, if there be a failure to perform any one of the covenants, and the grantee may thereby at once get payment of the whole of the capitalised interest; but that is a step which he is entitled to take for the maintenance of his security.

[FRY, L.J. Surely the form given in the schedule requires that the interest shall be computed year by year, or month by month, or by other fixed periods, as the parties may agree upon.]

The Bills of Sale Act (1878) Amendment Act, 1882, cannot have been intended to revive the laws against usury, which have been long abolished: 17 & 18 Vict. c. 90. No doubt the schedule must be construed as having an application to all bills of sale arising out of loans of money; but the statute is very loosely

(1) 10 Q. B. D. 414.
(2) 27 Sol. Jour. 296; Weekly Notes (1883), 40, 44.

drawn; the only requisites of a bill of sale are (1), that the consideration shall be truly stated; (2), that it shall, substantially, follow the form in the schedule; and (3), that the statutory powers as to entry and seizure shall be strictly observed; but the parties may agree as to the terms and the time at which the amount may become payable. S. 7, sub-s. 1, clearly allows entry and seizure by the grantee upon non-payment of the money due and upon non-performance of the covenants; and this enactment renders valid the provisions of this bill of sale.

Meadows White, Q.C. (*C. C. Scott*, with him), for the execution creditor. Every bill of sale must be in accordance with the form in the schedule, and must be precise as to the liability of the grantor; but the bill of sale in the present case does not comply with those conditions; for the capitalised interest is not computed rateably, and it is uncertain when the grantor may be called upon to pay the whole of it. [He was then stopped.]

A. T. Lawrence did not reply.

BRETT, M.R. The Bills of Sale Act (1878) Amendment Act, 1882, will give rise to many discussions on questions of law: its provisions have been drawn with stringency against the holders and the takers of bills of sale. Whatever may be thought of the wisdom of this legislation, I feel myself bound to come to the conclusion that the object of the statute was twofold: first, that the borrower should understand the nature of the security which he was about to give for the debt due from him; and, secondly, that a creditor upon merely searching the register should be able to understand the position of the borrower, and should not be compelled to go to a solicitor in order to get counsel's opinion as to the meaning of a security already created by the borrower. These objects are carried out by s. 9, which requires that bills of sale shall, as nearly as possible, be in the form given in the schedule; that form is very simple, and an intending creditor has the opportunity of ascertaining how far he ought to trust the borrower, and he need not take advice as to the document before him. The legislature intended that the loan of money upon the security of a bill of sale shall be a simple transaction; a bill of sale given by way of security for the payment of money shall be void against

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all the world, even as against the grantor, if it does not comply with the provisions of s. 9. That enactment provides that a bill of sale shall be "in accordance with the form in the schedule." That must mean that every bill of sale shall be substantially like the form in the schedule. Nothing substantial must be subtracted from it, and nothing actually inconsistent must be added to it. The real principle of the form is that whatever may be the consideration for the sum of money secured by the bill of sale, a fixed sum shall be stated therein in figures and in direct terms, and that sum with rateable interest thereon shall be recovered by the holder; that interest shall be calculated up to the time when the sum mentioned as the principal amount shall be called in. The grantee must not attempt to alter the sum secured, and nothing must be added to it except by way of rateable interest. The statute does not prevent payment of the principal sum by instalments together with interest from time to time falling due; and at the time of paying each instalment interest at the agreed and named rate may be added. And I do not think that the statute prevents the payment of interest by instalments becoming due at fixed periods. But if upon failure to pay the first instalment the whole of the interest, which the grantee is ultimately upon performance of the contract to receive, becomes immediately payable, the bill of sale would, I think, be contrary to the form in the schedule of the Act; for interest is payable upon money only so long as it is due, and it is contrary to the nature of interest to make it payable before it is due, on the ground that a condition has not been performed, or because a certain event has happened; that is an alteration of, and a departure from, the form given in the schedule to the Act. There is, therefore, a blot upon the bill of sale before us; for upon breach of the covenants, it may be immediately after the execution of the bill of sale, the sum secured may be altered into a larger sum by means of what is called "capitalised interest:" in truth it is not interest at all, because the holder of the bill of sale may at any time repay himself the 300*l.* and take the 180*l.* besides. The effect of the provisions is that upon breach of any of the covenants he shall be paid those two amounts in full. This consideration is alone sufficient to uphold the judgment of the Queen's Bench Division. And I

think the other blot pointed out by Cave, J., fatal; it was intended by the parties to the bill of sale to allow the grantee to seize in a manner not permitted by the statute. There may be further blots upon this bill of sale, but as it is unnecessary to decide upon them, I think it better not to express any opinion as to them. The judgment of the Queen's Bench Division must be affirmed.

LINDLEY, L.J. I am of the same opinion. The questions to be decided are: first, what is the true construction of the statute? and, secondly, does this bill of sale conform to it?

The material sections of the Act for us to decide upon are the 7th and 9th; a bill of sale is rendered void by s. 9, unless it is in the form given in the schedule. Various kinds of forms of bills of sale exist; but the legislature has fixed upon one form, and every bill of sale must be "in accordance with" it. When we look at the form given by the statute, we see what it contains: it is framed with reference to s. 7. A better precedent might have been adopted; but the provisions of the statute must be worked out by courts of law. The bill of sale before us has the vice of asking for too much. It allows the grantee to seize under circumstances under which the Act does not permit him to avail himself of his security; the form and the provisions of this bill of sale render s. 7 of the statute nugatory. That is the real and fatal blot in the claimant's case, and it is one which he cannot do away with.

FRY, L.J. I am of the same opinion. The meaning of s. 9 is that every bill of sale which is not substantially "in accordance with the form in the schedule," shall be void. The schedule provides that the grantor shall assign his chattels subject to redemption upon payment of a fixed sum and interest thereon. The interest secured by every bill of sale must be rateable, otherwise there will be a variance in substance from the form given in the schedule. That form allows the rate of interest to be such as may be agreed upon; but whatever the amount may be, the interest must be rateable; in the bill of sale before us the interest is in one sense rateable, but, if a breach of the covenants is

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committed, the rate is varied because the whole amount becomes immediately payable. The legislature has provided for two purposes that the rate of interest must be ascertained; first, that the borrower may be protected; secondly, that publicity may be given so that persons dealing with the borrower may know what rate of interest he is bound to pay. A fixed sum by way of interest may be lawful. The argument for the claimant overlooks the fact that the legislature intended to make all bills of sale certain in their terms, and therefore that certainty is very material in drawing bills of sale; but this bill of sale leaves it uncertain at what time the grantee may become entitled to the whole of the capitalised interest. This is not a case to which the maxim applies, Id certum est quod certum reddi potest. Then is the bill of sale contrary to the provisions of s. 7? That section applies to all bills of sale under the Act. It is said that the provision, which causes the money to become due upon failure to produce the receipts, is lawful. The suggested mode of construing s. 7 opens the door to the insertion of every clause which it was intended to exclude; the bill of sale before us sins against s. 7, sub-s. 4, because it enables the grantee, who has lent the money, to seize the goods upon a failure to comply with a verbal demand for the production of receipts for rents, rates, and taxes, and this is a stipulation which is impliedly forbidden by sub-s. 4. It is said that this is only a covenant for the maintenance of the security, and is therefore good within sub-s. 1, which allows the goods to be seized whenever the money secured by the bill of sale is due; but a covenant of that kind cannot be good, if it is prohibited by the legislature. The goods cannot be seized under sub-s. 1 upon the plea, that the money is due owing to a failure to perform a covenant which is unlawful. The covenant which I have mentioned is bad, because it alters the relation between the parties which the legislature intended to allow. The legislature has declared that a covenant of this kind shall be void, and the parties cannot alter the effect of the Act of Parliament. The provision that the money shall become due upon the failure to comply with an illegal covenant is bad, and cannot be supported under sub-s. 1. Several other objections may perhaps be raised; but as to these I say nothing. The bill of sale before us sins

against ss. 7 and 9, and therefore the judgment of the Queen's Bench Division was right and must be affirmed.

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Judgment affirmed.

Solicitors for execution creditor: *Walter & Durham.*
Solicitors for claimant: *Moresby White, Salmond, & Co.*

J. E. H.

[IN THE COURT OF APPEAL.]

May 29.

COVERDALE, TODD, & Co. *v.* GRANT & Co.

Ship—Charterparty—Commencement of Lay Days—"Frost preventing Loading."

By the terms of a charterparty the ship was to proceed to the port of loading and there load a cargo of iron in the customary manner from the agents of the freighters: "Cargo to be supplied as fast as steamer can receive. . . . Time to commence from the vessel being ready to load and unload and ten days on demurrage, over and above the said lay days, at 40*l.* per day. [Except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading and unloading; in which case owners to have the option of employing the steamer in some short voyage trade, until receipt of written notice from charterers that they are ready to resume employment without delay to the ship.]" On the ship's arrival she went into dock and the loading was commenced; but frost having afterwards set in, the canals, through which part of the cargo had to pass in lighters to reach the vessel, became impassable owing to ice, and the loading was wholly stopped for five days:—

Held, on the authority of *Kay* v *Field* (10 Q. B. D. 241), that the exception in the charterparty as to frost did not relieve the charterers from liability for demurrage, inasmuch as the detention of the cargo by ice occurred in the canals before the cargo reached the dock where the vessel was lying.

Judgment of Pollock, B. (8 Q. B. D. 600), reversed.

APPEAL by the plaintiffs from the judgment of Pollock, B., on further consideration, in favour of the defendants. The facts of the case are stated in the report of the proceedings in the Queen's Bench Division (1), and also may be gathered from the above head-note.

Sir F. Herschell, S.G. (*Brynmôr Jones* with him), for the plaintiffs. This case is governed by the decision of the Court of Appeal in *Kay* v. *Field*. (2)

Bowen Rowlands, Q.C., and *Moulton*, were called upon to argue

(1) 8 Q. B. D. 600. (2) 10 Q. B. D. 241.

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for the defendants. This case is distinguishable from *Kay* v. *Field*. (1) The words of the charterparty in that case were simply—"Detention by frost . . . . not to be reckoned as lay days;" but in the present case the words are: "Time to commence from the vessel being ready to load and unload and ten days on demurrage, over and above the said lay days, at 40*l*. per day; except in case of . . . . frosts . . . . preventing the loading and unloading." The word "preventing" must be read as meaning "stopping." In the present case the loading was stopped by the frost, after it was commenced, and therefore the exception applies.

Sir F. Herschell, S.G., was not called upon to reply.

BRETT, M.R. I think that no distinction exists between this case and *Kay* v. *Field*. (1) The charterparties were substantially the same, and there was the same excuse for not loading, for the referee has found as a fact that the delay in loading was caused by the frost alone. There is nothing to induce me to depart from the principle of *Kay* v. *Field*. (1) I think that we are bound by the judgment in that case.

LINDLEY, L.J. I see no difference between this case and *Kay* v. *Field*. (1) It is contended that the clauses as to exceptions in the two charterparties are different; but the argument fails when the exceptions themselves are looked at; the detention of the cargo by ice in the canals was not a detention during the loading; it was a detention before the loading of the part of the cargo so detained. The appeal must be allowed; but I agree with Pollock, B., in thinking that the two cases are the same in principle. Judgment must be entered for the plaintiffs.

FRY, L.J. I agree that this case stands upon the same ground as *Kay* v. *Field*. (1)

Appeal allowed.

Solicitors for plaintiffs: *Shum, Crossman, Crossman, & Pritchard, for Turnbull & Tilley, West Hartlepool.*

Solicitors for defendants: *Clarke, Rawlings, & Clarke.*

(1) 10 Q. B. D. 241.

J. E. H.

[IN THE COURT OF APPEAL.]

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May 24.

IN RE W. A. FRESTON.

Contempt of Court—Attachment—Privilege—Police Court—Solicitor—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *subs.* 4—*Debtors Act*, 1878 (41 & 42 *Vict. c.* 54), *s.* 1.

Disobedience by a solicitor to an order of court made against him as an officer of the court is a contempt of a criminal nature, and an attachment granted to enforce compliance with the order of court is process of a punitive and disciplinary character; and therefore no privilege from arrest exists or can be claimed against the execution of the attachment.

Privilege from arrest for contempt of court, where it otherwise exists, can be claimed in respect of attendance as an advocate at a police court as well as at any other court, although the proceedings at the police court consist merely of a preliminary inquiry on a charge of felony.

F. was a solicitor, and an order was made at chambers that he should deliver up certain documents and should pay the sum of 10*l.* and certain costs. This order was made against F. as an officer of the court. F. delivered up the documents, but he did not pay the sum of 10*l.* or the costs. An order for the attachment of F. for contempt of court was thereupon made at chambers. F. then paid the sum of 10*l.*, but he did not pay the costs. He was arrested under the attachment, whilst he was on his return to his offices from a metropolitan police court, where he had been as advocate attending to defend certain persons at a preliminary inquiry on a charge of treason-felony:—

Held, that he was not entitled to be discharged from custody on the ground of privilege from arrest, the attachment having been granted for a contempt of a criminal nature.

W. A. FRESTON was a solicitor of the Supreme Court. On the 4th of March, 1882, a summons was issued at the instance of Messrs. Benn, solicitors of Rugby, for an order against him that he should deliver up certain documents to Messrs. Brownlow & Howe, their agents in London, and should pay a sum of 10*l.* which Messrs. Benn had sent to Freston owing to a representation from him that he was acting for a person, whose execution was desired of a certain deed of conveyance, and who would execute the deed, if he received 5*l.*, and if Freston received 5*l.* agreed costs. These documents and a cheque were sent to Freston on the 21st of September, 1881. Nothing was afterwards heard from Freston, and although many calls were made at his address, 152 Euston Road, Freston could not be seen, and all letters were

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unanswered. On the 14th of March, 1882, Freston not having answered the affidavit in support of the summons, a master ordered that W. A. Freston should forthwith deliver up to Messrs. Brownlow & Howe the following documents; 1, an engrossment of deed of conveyance; 2, Messrs. Benn's draft of the said deed; 3, printed particulars and conditions of sale, and contract with S. Few for sale of property at Lutterworth, dated the 21st of July, 1881; and also the sum of 10*l.* forwarded by the applicants, and should pay the costs of the application. Freston appealed from this order of the master, but North, J., on the 18th of March, dismissed the appeal with costs. On the 17th of March an execution was issued for the sum of 10*l.* and for the costs of the master's order of the 14th of March and of the execution, and on the 21st of March another execution was issued for the costs of the order of North, J., of the 18th of March, and of the execution. The sheriff levied at the offices of Freston, situate at 152 Euston Road; but the goods seized there were claimed by other persons under a bill of sale and a marriage settlement, and the sheriff was compelled to withdraw from possession. On the 23rd of March the documents numbered 1 and 2 were delivered to Messrs. Brownlow & Howe by a clerk to Freston, who promised to let them have the documents numbered 3 on the next day. This not having been done, a summons for leave to issue a writ of attachment against Freston for his contempt in not obeying the orders of the 14th and 18th of March, was issued and made returnable on the 5th of April, when it came on to be heard before North, J., who adjourned it for fourteen days at the request of Freston's solicitor, in order that he might obtain an affidavit in answer to the further affidavits used in support of this application. No affidavit in answer was ever made, and on the 19th of April, 1882, the adjourned summons came on to be heard before Denman, J. On this occasion the documents numbered 3 were handed by Freston's solicitor to the judge, who gave them up to the clerk of Messrs. Brownlow & Howe. Denman, J., made an order that the writ for an attachment should issue, but directed that it should not be drawn up if the costs of the orders of the master and of North, J., and of the application and the sum of 10*l.* should be

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paid within a week. The sum of 10*l.* and the costs remained unpaid, and the writ of attachment was issued and delivered to the sheriff of Middlesex on or about the 27th of April, 1882. On the 14th of July the sum of 10*l.* was paid on behalf of Freston to Messrs. Brownlow & Howe. All the efforts to arrest Freston under the attachment having proved unsuccessful, the writ of attachment was renewed in October, 1882. Ultimately Freston was arrested under the attachment on the afternoon of the 26th of April, 1883, by an officer of the sheriff of Middlesex, whilst he was proceeding to his offices at 152 Euston Road from the police court at Bow Street, where he had been acting before Sir J. Ingham, the chief magistrate, as solicitor and advocate on behalf of certain persons named Gallagher, Curtin, and Whitehead, who were prisoners, and were being prosecuted on behalf of the Queen for an alleged offence of treason-felony. Freston was taken by the sheriff's officer to gaol. He had appeared for and defended the same persons on their several retainers as their solicitor and advocate at the police court on the 20th of April. A summons was on the 27th of April issued to discharge Freston from custody on the ground that he was at the time of his arrest privileged as an advocate from being arrested. Manisty, J., having referred the application to the Queen's Bench Division, it was there held by Grove and Stephen, JJ., that the application must be dismissed with costs: the learned judges were of opinion that if a contempt were committed in the face of a court, there could be no privilege, and that the same rule must apply to every kind of contempt. On the 3rd of May a summons was issued to discharge the order of Denman, J., for an attachment and to discharge Freston from custody upon the ground that at the time when the order was made, Freston had performed the acts directed to be done by him by the orders of the 14th and 18th of March, so far as related to the delivery of the documents, and had before his arrest complied with the orders by paying the sum of 10*l.* thereby ordered to be paid by him. Manisty, J., having refused the application, the Queen's Bench Division (Grove and Stephen, JJ.) affirmed his decision.

W. A. Freston appealed to the Court of Appeal against the two decisions of the Queen's Bench Division.

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May 23. *Bowen Rowlands, Q.C.*, and *Wyatt Hart*, for W. A. Freston. The nature of attachment for contempts of court is treated of in 2 Hawkins' P. C., 8th ed. ch. xxii. p. 206, and no doubt it is very clear law that a solicitor may be punished by imprisonment for refusing or neglecting to do an act which he has been ordered to do by the High Court. But in the present case Freston was privileged from arrest, for he was returning from the discharge of his duties at a police court as advocate for certain persons charged with treason-felony. The privilege from arrest extends to all persons whether parties, witnesses, or solicitors, whilst going to, attending, or returning from any court, whether superior or inferior: 1 Archbold's Practice, 13th ed. part v. ch. xxxviii. p. 652, and ch. xlii. p. 687. A witness attending a police court is privileged from arrest: *Montague* v. *Harrison*. (1)

[BRETT, M.R. These authorities merely shew that Freston would have been privileged from arrest upon civil process; but he was arrested for contempt of court.

FRY, L.J. Even a member of parliament is not privileged from arrest for contempt of court: *Lechmere Charlton's Case*. (2)]

In *Attorney General* v. *Leathersellers' Co.* (3) a solicitor had been arrested, whilst on his way to court, for a contempt in not delivering his bill of costs pursuant to an order, and the Master of the Rolls held that he was entitled to be discharged.

[LINDLEY, L.J. *Re Jewitt* (4) is a similar case.]

In *Newton* v. *Constable* (5) it was held that a barrister was not protected from arrest, whilst he was returning from a court of petty sessions, which he had been attending without a previous retainer; but that case does not apply, for it is clear from the affidavit of Freston that he attended the police court at Bow Street pursuant to a previous retainer. In *Eyre* v. *Barrow* (6) it was held by Stuart, V.C., that a solicitor, who was defendant in a suit and against whom a decree had been made, must be discharged from custody after he had been arrested during the discharge of his professional duties upon an attachment for non-payment of

(1) 3 C. B. (N.S.) 292; 27 L. J. (C.P.) 24.

(2) 2 My. & Cr. 316.

(3) 7 Beav. 157.

(4) 33 Beav. 559.

(5) 2 Q. B. 157; 1 G. & D. 408. 9 Dowl. 933.

(6) 27 L. J. (Ch.) 784; 6 W. R. 767.

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certain sums of money pursuant to the decree. A solicitor, wrongfully arrested notwithstanding his privilege, is entitled to the costs occasioned by his arrest and discharge: *Dodd* v. *Holbrook*. (1)

[BRETT, M.R. Suppose that a solicitor on his way to a court of assize puts up in a public place, before he reaches the court, a libel on the judges of assize; can he not be forthwith attached, although he has been retained for the defence of a prisoner about to be tried at the assizes? The order of Denman, J., must be treated as it stood at the time when it was made; it was therefore an order upon the solicitor as officer of the court and he was liable, for contempt, although at the time of the arrest the only duty unfulfilled was the non-payment of the costs.]

Re Ball (2) shews that the disobedience by a solicitor of an order for the payment of money creates merely a civil liability; in the present case Messrs. Benn have issued writs of execution against Freston. He has performed the substantial part of the order of Denman, J.; he cannot be lawfully imprisoned merely for the non-payment of the costs: *Jackson* v. *Mawby* (3); *Mickle-thwaite* v. *Fletcher*. (4) It may be contended for Messrs. Benn that the costs which Freston was ordered to pay, were costs occasioned by his misconduct as an officer of the court; but it has been decided that a solicitor cannot be attached for non-payment of costs: *In re Hope*. (5) The judges of the Queen's Bench Division were of opinion that if the argument on behalf of W. A. Freston were right, there could be no commitment for a contempt in the face of the court; for all contempts are of the same nature. But surely this view cannot be sustained. It is clear that there are two kinds of contempt of court, namely, civil and criminal; non-payment of costs may, under some circumstances, be a gross contempt of court, nevertheless it is always of a civil nature. In the present case the order for attachment was delivered to a party to the proceedings; Denman, J., did not himself deliver it to the sheriff; if the contempt had been of a criminal nature, the order for attachment would not have remained unexecuted for a year. Although the attachment was against a solicitor, it was not

(1) 35 L. J. (Ch.) 175.
(2) Law Rep. 8 C. P. 104.
(3) 1 Ch. D. 86.
(4) 27 W. R. 793.
(5) Law Rep. 7 Ch. 523.

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punitive, for it was not intended to punish him; it was intended merely to compel payment of the money ordered to be paid, and he would have been entitled to be released as a matter of course upon compliance. The attachment was merely process to bring Freston within the jurisdiction of the Court; the authorities do not justify the drawing of a distinction between a solicitor and any other person. In the present case Freston had left the police court, but he was clearly entitled to the privilege from arrest so long as the proceedings lasted: *Persse* v. *Persse.* (1) A case very analogous to the present is to be found in *Cobham* v. *Dalton* (2); and there James, L.J., expressed an opinion that the defendant, who had been arrested whilst he was returning from attending the Court of Bankruptcy, was entitled to be discharged on the ground of privilege; it is a strong authority in favour of Freston. On behalf of Messrs. Benn reliance may be placed on *Marris* v. *Ingram* (3), where Jessel, M.R., appeared to think that the Debtors Act, 1869, was passed for the punishment of fraudulent debtors; but that case is distinguishable, for the question of privilege did not arise. The doctrine as to privilege was construed as having a wide operation in *Ex parte Byne, In re Bryant.* (4)

[BRETT, M.R. That case was decided in 1813, when defendants in actions might be arrested on both mesne and final process.]

In *Spence* v. *Stuart* (5) a defendant had been arrested just after he had attended as a witness before an arbitrator, and it was held that he could not be detained in custody.

[BRETT, M.R. The real point in that case was that privilege from arrest can be claimed in respect of attendance at an arbitrator's court.]

Alfred Cock, for the Sheriff of Middlesex.

A. T. Lawrence, for Messrs. Benn. In the present case the person imprisoned was an officer of the court, and he disobeyed its order; the attachment was not as to a matter of merely civil

(1) 5 H. L. C. 671.
(2) Law Rep. 10 Ch. 655, at p. 657.
(3) 13 Ch. D. 338.
(4) 1 Rose, B. C. 451.
(5) 3 Ea t, 89.

obligation, the contempt was of a criminal nature, and he could not be set at liberty without an order of the court.

[FRY, L.J. In 2 Seton on Decrees, part 6, ch. 47, sect. 8, pp. 1594, 1595 [4th ed.], forms of orders are given for the discharge of prisoners pursuant to the Debtors Acts, 1869, 1878.]

Further, no privilege existed in the present case: Freston was merely attending a police court, which was engaged on a preliminary inquiry: it had not the incidents of a public tribunal; the magistrate might have heard the charge with closed doors: 11 & 12 Vict. c. 42, s. 19.

[BRETT, M.R. The investigation before a grand jury is held with closed doors, and yet privilege from arrest can be claimed by a witness attending to give evidence before a grand jury. In the present case the charge was of treason-felony, and was heard before a judicial officer. We all are clearly of opinion that privilege may be claimed by an advocate or witness attending a police court.]

Bowen Rowlands, Q.C., in reply. Freston had not been guilty of fraud towards a client, he ought not to have been arrested: 4 Stephen's Com., 8th ed. book 6, ch. xi. p. 335.

May 24. The following judgments were delivered:—

BRETT, M.R. The facts of this case may be shortly stated as follows:—

An order was made at chambers that W. A. Freston, a solicitor, should deliver up certain documents to Messrs. Brownlow & Howe, should pay the sum of 10*l.*, and should pay certain costs. The order was made by a master on the 14th of March, and affirmed by a judge on the 18th of March, 1882. On the 23rd of March, 1882, some of the documents were delivered up. A summons for leave to issue an attachment against W. A. Freston was taken out and came on to be heard before Denman, J. At the hearing before Denman, J., the remaining documents were delivered up. The learned judge ordered that the writ of attachment should issue, but directed that his order should not be drawn up if the costs and the sum of 10*l.* should be paid within a week. The writ of attachment was issued and delivered to the

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sheriff on or about the 27th of April, 1882. On the 14th of July, 1882, the sum of 10*l.* was paid on behalf of W. A. Freston. The costs have never been paid. W. A. Freston was arrested by the Sheriff of Middlesex as he was returning to his offices from the police court at Bow Street, where he had been acting before the chief magistrate as solicitor and advocate for certain persons charged with treason-felony. The Queen's Bench Division have refused to set him at liberty.

It has been argued on behalf of Freston that he is entitled to be discharged on the ground of privilege. It has been objected that no privilege existed in his favour, because the hearing of the charge at the police court was merely a preliminary inquiry: I think it very plain that the privilege did exist, provided the process upon which he was arrested was of a civil nature. It is clear that there is no privilege from arrest upon a criminal charge; but the privilege does apply as to arrest upon mesne process, and upon judgments for debts and other causes of action: it is clear that the privilege can be successfully claimed by members of parliament, by witnesses going to or coming from courts of justice in obedience to subpœnas, and by solicitors and barristers attending courts to discharge their professional duties. But then the question arises, whether the privilege extends to arrests or attachments for contempts of court. It has been said in the Queen's Bench Division, that all attachments for contempt of court are the same and have the same incidents. I cannot assent to this. I think that the incidents are different, because the nature of contempts is different. The question depends upon the kind of contempt. In the Court of Chancery attachment for contempt might be merely a means of enforcing obedience to a decree, which was a judgment upon a dispute as to a civil right between the parties to the suit; a decree of the Court of Chancery was of the same nature as a judgment of the courts of common law; and I think, that as to contempts of this nature, privilege would apply. There were, however, other kinds of contempt in which attachments were granted for the purpose of preventing a breach of the law and of maintaining the discipline of the courts, and in these cases the question is whether the attachment is more like criminal or civil process, whether it is more like arrest for a

crime, or more like the enforcement of a decree in a suit between parties. In *McWilliams' Case* (1), Lord Redesdale, L.C., said: "There can be no doubt that the thing to be considered is, not the form of the process but the cause of issuing it; if the ground of the proceeding be a debt, it is a process of debt; if the ground be a contempt, as for instance, disobedience of some order of the Court, where the object was not to recover a debt by means of the process, the consequences of such a process are in some degree of a criminal nature." This passage seems to me to shew the distinction between the two kinds of attachment. I now turn to the judgment of Lord Brougham, L.C., in *Long Wellesley's Case* (2); it was a case of alleged protection from attachment by privilege of parliament. The Lord Chancellor said: "The line, then, which I draw, is this;—that against all civil process privilege protects; but that against contempt for not obeying civil process, if that contempt is in its nature or by its incidents criminal, privilege protects not; that he who has privilege of parliament, in all civil matters, matters which, whatever be the form are in substance of a civil nature, may plead it with success, but that he can in no criminal matter be heard to urge such privilege: that members of parliament are privileged against commitment, quà process, to compel them to do an act;—against commitment for breach of an order of a personal description, if the breach be not accompanied by criminal incidents, and provided the commitment be not in the nature of punishment, but rather in the nature of process to compel a performance;—that in all such matters members of parliament are protected; but that they are no more protected than the rest of the king's subjects from commitment in execution of a sentence, where the sentence is that of a court of competent jurisdiction, and has been duly and regularly pronounced." The words, "provided the commitment be not in the nature of punishment," are very material in the present case, as pointing out the limit to be placed upon the privilege claimed. I do not feel bound by the language used by Lord Brougham, but I am bound by the principle enunciated. That principle is that process to enforce civil obligations is subject to privilege, but process for acts in the nature of offences is not.

(1) 1 Sch. & Lef. 169, at p. 174. (2) 2 Russ. & My. 639, at pp. 665, 666.

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Attachments are granted for neglect of obedience to the orders of courts of justice; when they are issued merely for the purpose of enforcing judgments in civil disputes, and when the breach of the order to do or not to do something cannot be said to be in the nature of an offence, then the privilege can be claimed; but where an attachment is issued for a breach of the law, or as a remedy for something that is a breach of the law and in the nature of an offence, no privilege can be claimed. The question, therefore, is, whether if a solicitor disobeys an order made on him in his character as a solicitor, he commits an offence and becomes subject to criminal process, or whether he is merely subject to civil process. Before the Debtors Act, 1869 (32 & 33 Vict. c. 62), the Court did exercise a peculiar jurisdiction over solicitors; peculiar duties were confided to them: they were not mere trustees: as attorneys they were under the jurisdiction of the courts of common law: they were persons in whom confidence and trust were placed by law, and they were especially bound to act with good faith. The judges of the courts of law and equity exercised a peculiar jurisdiction, and they exercised that discipline because solicitors were officers of those courts, and breaches of their duty as solicitors were offences against those courts. The Debtors Act, 1869, s. 4, sub-s. 4, recognises and acknowledges this principle; for the power of arrest was retained against solicitors, and apart from this principle there could be no reason for excepting solicitors from the abolition of arrest for debt. The rights of those employing solicitors were not merely of a civil nature; and the courts dealt with defaulting solicitors on the ground, that they had been guilty of breaches of duty and breaches of the law. It has been argued that the order of Denman, J., was not punitive, or as I prefer to term it, disciplinary; because, after Freston was attached and arrested, he would be released as a matter of course upon compliance with the order. I am not convinced that this argument is correct. I do not think that a solicitor would be entitled to be released ex debito justitiæ upon doing the acts commanded, or upon ceasing to do the acts forbidden, as the case may be; he must apply to the Court for an order to release him, and the Court must order the process to be relaxed; and whether or not it is customary to

order the solicitor to be released from imprisonment as a matter of course, the Court can always order the solicitor to pay the costs of the application; but the Court could not make such an order, if he could claim to be released as a matter of right. (1) The Debtors Act, 1878 (41 & 42 Vict. c. 54), s. 1, also shews that the courts have a discretion as to the discharge of solicitors in custody for a contempt; that discretion is recognised by the legislature. The enactment, was no doubt, of a mitigating character, for it gave power to the Court to order the discharge; but it is still necessary for a solicitor who is in contempt to obtain an order for his discharge. The Court has power to order the discharge of the solicitor, when his breach of duty either was unintentional or arose from sickness. The Debtors Acts, 1869, 1878, were much commented upon in *Marris* v. *Ingram* (2): the late Master of the Rolls, my immediate predecessor, took a strong view as to the effect of the provisions of the earlier Act, which he pointed out was intended, at least partly, "for the punishment of fraudulent debtors;" and he also stated the reasons of the legislature for passing the later Act. He referred to the case of fraudulent trustees, who fall within the Debtors Act, 1869, s. 4, sub-s. 3: they ought to be punished as criminals, and the statute punished their misconduct as a criminal offence. He spoke also of defaulting solicitors, who fall within sub-s. 4; and the words which he used shew that he had an equally strong opinion as to them. I do not altogether agree with the language of the late Master of the Rolls; but I entirely agree that the statutes go a very long way to shew that a default by a solicitor is an act of a criminal nature, for which he may be punished as for a contempt. The contempt of W. A. Freston was in the nature of an offence, and no privilege can be claimed on his behalf; for attachment is a mode of curing or punishing an offence. The order of the Queen's Bench Division was right, and the appeal must be dismissed.

I wish to add that *Attorney-General* v. *Leathersellers' Co.* (3) presents no difficulty, and is not in conflict with our judgment; the decision of the Master of the Rolls was not taken on the

(1) See 1 Dan. Ch. Prac. ch. x. s. 4, pp. 431, 432 (5th Ed.).

(2) 13 Ch. D. 338.

(3) 7 Beav. 157.

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ground, whether a solicitor who has been guilty of a contempt is entitled to be discharged, if he is arrested while going to or coming from a court. The only point argued was whether the solicitor, who was arrested, had deviated from the direct route to the court.

LINDLEY, L.J. I am of the same opinion. As regards the right of protection from arrest, I draw no distinction between a police court and any other court: but in order to decide on the question of privilege, we must look at the nature of the attachment and at the ground of committal, and we must consider the history of the case. In March, 1882, a summons was taken out at chambers against Freston, and an order was made by a master that he should deliver up certain documents, pay the sum of 10*l.*, and the costs. He appealed to the judge in chambers, who affirmed the master's order. Freston did not obey the order, and he did not at the time appeal to the Divisional Court. A writ of attachment was applied for, and I may briefly say that Denman, J., on the 19th of April ordered the attachment to issue for contempt, upon which he has been arrested. Is this attachment simply in the nature of civil process? if it is, this solicitor ought to be discharged. In *McWilliams' Case* (1) Lord Redesdale, L.C., has pointed out that all contempts are not the same; they are of different kinds; some contempts are merely theoretical, but others are wilful, such as disobedience to injunctions or to orders to deliver up documents—in these cases there is no privilege from arrest. In this case the attachment was granted for something more than a mere theoretical contempt, and therefore it was something more than merely civil process: there was therefore no privilege. This view is strengthened by the language of the Debtors Act, 1869, s. 4, subs. 4: it assumes that a solicitor who fails to pay a sum of money when ordered by the Court, is guilty of misconduct and also of an offence for which he may be punished by imprisonment; and this tends to shew that the attachment was not upon civil process. The cases cited during the argument are not in conflict with our decision.

(1) 1 Sch. & Lef. 169, at p. 174.

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Attorney-General v. *Leathersellers' Co.* (1) turned upon the ground whether the privilege had been lost by an alleged deviation from the route to the court. In *Re Jewitt* (2) the only question really argued was whether the Judges' Chambers in Serjeants' Inn constituted a court in respect of which privilege could be claimed. *Eyre* v. *Barrow* (3) was a case of formal contempt and not of wilful disobedience amounting to misconduct; no matter of discipline was involved, there was no default calling for punishment. In the present case the practical question is whether Freston shall be discharged from custody without paying the costs.

FRY, L.J. It is plain that where attachment is mere process, privilege exists; where it is punitive or disciplinary, the privilege does not exist. This distinction was laid down in *Long Wellesley's Case* (4), which was referred to and approved of in *Lechmere Charlton's Case.* (5) The principle applies more strongly against solicitors than members of parliament. The order of the master directed various acts to be done, and the attachment was granted by Denman, J., against Freston, because (amongst other reasons) the costs had been occasioned by his own misconduct. The attachment was something more than process; it was punitive or disciplinary, for the Court was proceeding against its own officer. Further, if the attachment were mere process, Freston could obtain his discharge ex debito justitiæ on shewing that he had performed what was required by the master's order; I do not think that he could have done so in the present case: the Court would have had a jurisdiction to exercise its discretion, and to punish him further. There was therefore no privilege. During the argument *Cobham* v. *Dalton* (6) was much pressed upon us. In that case the defendant was an executor and a trustee, and an order had been made by the Court of Chancery for payment of a sum of money into court, which he disobeyed. He became bankrupt, and was arrested under an attachment for disobedience to the order of the Court of Chancery, whilst he was on his way home after having passed his last examination in the Court of

(1) 7 Beav. 157.
(2) 33 Beav. 559.
(3) 27 L. J. (Ch.) 764; 6 W. R. 767.
(4) 2 Russ. & My. 639.
(5) 2 My. & Cr. 316, at p. 354.
(6) Law Rep. 10 Ch. 655.

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Bankruptcy. It is true that James, L.J., said at the end of his judgment that he was disposed to think that the defendant would have been "entitled to have the attachment discharged, on the ground that he was privileged from arrest while returning from the court": but the real ground of the decision was that he was exempt from arrest under the provisions of the Bankruptcy Act, 1869, s. 12. Moreover, the counsel for the respondent did not argue the question of privilege from arrest whilst the defendant was returning from court, and in reality James, L.J., did not come to any conclusion upon the subject. I may remark also that in *Cobham* v. *Dalton* (1) the attachment was not against a solicitor in his capacity as officer of the court, but against a party to the proceedings in the Court of Chancery.

Appeal dismissed. (2)

Solicitors for Messrs. Benn: *Brownlow & Howe.*
Solicitor for the sheriff of Middlesex: *W. Maynard.*
W. A. Freston, in person.

(1) Law Rep. 10 Ch. 655.

(2) W. A. Freston afterwards applied to Huddleston, B., for an order to discharge him from custody upon an affidavit stating that through illness and misfortune he was wholly without the funds to enable him to pay any part of the costs: Huddleston, B., refused the application. Freston appealed to the Queen's Bench Division, and Pollock, B., and Manisty, J., allowed the appeal, and ordered that he should be discharged without costs.

J. E. H.

[IN THE COURT OF APPEAL.]

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May 29.

GILBEY *v.* JEFFRIES.

Bankruptcy—Annulment—Scheme of Settlement of Bankrupt's Affairs—Discharge of Bankrupt—Bankruptcy Act, 1869 (32 & 33 *Vict. c.* 71), *s.* 28.

When a bankruptcy has been annulled under the Bankruptcy Act, 1869, s. 28, and a scheme of arrangement of the bankrupt's affairs has been approved of by the Court, the bankrupt is discharged from his debts, and no action is maintainable against him in respect of any debt provable under the bankruptcy.

THE statement of claim alleged that the plaintiff was executrix of the will of G. K. Gilbey, deceased, and that the defendant had been indebted to G. K. Gilbey for goods sold and delivered and for money lent and upon certain bills of exchange.

6. After the accrual of the debt the defendant was adjudicated a bankrupt, and the bankruptcy was subsequently annulled pursuant to a resolution of a statutory majority of creditors, whereby it was resolved that upon the defendant assigning to the trustee under the bankruptcy and the committee of inspection of his estate all his estate and effects for the benefit of his creditors, the order of adjudication in bankruptcy should be annulled. The defendant executed a deed of assignment in accordance with the resolution, and the resolution was filed in the court in which the bankruptcy was depending, and the resolution was approved by the Court and the judge thereof, and the bankruptcy was afterwards annulled as hereinbefore mentioned; but no estate or effects were ever delivered to or received by the trustee or the committee of inspection, and the plaintiff has not, nor had the said G. K. Gilbey, received any sum whatever on account of the debts, and after the bankruptcy the defendant promised G. K. Gilbey, and after the decease of G. K. Gilbey the defendant promised the plaintiff, as executrix, to pay the debts and the plaintiff's claim in this action to G. K. Gilbey and the plaintiff respectively.

The statement of defence admitted that the alleged debts were due from the defendant.

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3. The defendant denies that no estate or effects were ever delivered to or received by the trustee or committee of inspection. The defendant denies also that he promised G. K. Gilbey, and after the decease of G. K. Gilbey that he promised the plaintiff as his executrix, to pay the debts and the plaintiff's claim in this action to G. K. Gilbey or to the plaintiff.

4. The debt claimed was in fact proved in the bankruptcy by G. K. Gilbey deceased, and he was trustee therein. G. K. Gilbey voted in favour of the resolution. One of the assignees under the deed of assignment was G. K. Gilbey.

The defendant demurred to the statement of claim, and the plaintiff demurred to the statement of defence.

Field, J., gave judgment for the defendant on the demurrers, and the plaintiff appealed.

W. Graham, for the plaintiff. It appears from the pleadings that a general scheme of settlement of the affairs of the bankrupt has been assented to and approved of under the provisions of the Bankruptcy Act, 1869, s. 28; but when a bankruptcy is annulled under that enactment, the bankrupt may be sued by his creditors, who may obtain judgment against him, unless the Court of Bankruptcy in the exercise of its discretion restrains the actions against him: *Clarke* v. *Williams*. (1) No release of the bankrupt's debts is contained in sect. 28; there is merely an accord without satisfaction. When a bankruptcy is annulled, the property of the bankrupt vests in such person as the Court of Bankruptcy may appoint, and in default of an appointment reverts to the bankrupt: Bankruptcy Act, 1869, s. 81. The defendant obtains all the benefits arising from the annulment: *Bailey* v. *Johnson* (2); and he cannot escape from the liabilities, to which he is exposed when he is set free from the proceedings in bankruptcy: *West* v. *Baker*. (3) Moreover the defendant promised to pay the debts after the bankruptcy.

[FRY, L.J. There was no consideration for the promise.]

J. L. Walton was not called upon to argue for the defendant.

(1) 3 H. & C. 1001; 34 L. J. (Ex.) 189. (2) Law Rep. 7 Ex. 263.
(3) 1 Ex. D. 44.

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BRETT, M.R. The claim discloses certain facts which put the plaintiff out of court; and for the reasons which I shall give the claim is bad. The question before us is, what is the proper construction of the Bankruptcy Act, 1869, s. 28? In the present case a general scheme of settlement of the defendant's affairs was passed and approved of; is not that equivalent to a discharge? I am of opinion that it is. I think that upon the true construction of s. 28 the bankrupt must be taken to have been discharged: upon a contrary construction the debtor would derive no benefit from the annulment of his bankruptcy; he would be left in the position in which he was before the proceedings in bankruptcy commenced, and would be exposed to the suits of his creditors, although if the proceedings in bankruptcy had taken their ordinary course he might have obtained his discharge from the Court. We have been pressed with *Clarke* v. *Williams* (1), and the conclusion which it is desired to draw from that case is, that although the Court of Bankruptcy will restrain execution, nevertheless in the High Court the action ought to be allowed to proceed. Such a result seems to me absurd. *Clarke* v. *Williams* (1) may have been well decided on the former Acts as to bankruptcy; but its principle does not apply to the Bankruptcy Act, 1869; the legislature has altered the law. The words of s. 28 are very important for the decision of this case. The trustee may, with the sanction of a special resolution of the creditors, accept any composition offered by the bankrupt, with or without a condition that the order of adjudication is to be annulled; surely the composition with the creditors must have been intended to set the bankrupt free from his debts; in the alternative the trustee with the like sanction may "assent to any general scheme of settlement of the affairs of the bankrupt." The scheme must have been intended to finally dispose of the bankrupt's liabilities; but upon the construction of the plaintiff's counsel there is no settlement so far as the bankrupt is concerned. Upon the true construction of the section the scheme of arrangement must be taken to operate as a discharge in bankruptcy. I think that the judgment in the Court below was right.

(1) 3 H. & C. 1001; 34 L. J. (Ex.) 189.

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LINDLEY, L.J. I am of the same opinion. In order to determine the true position of the parties upon the facts alleged in the pleadings, we must look at the Bankruptcy Act, 1869, s. 28; by the last words of that enactment "the approval of the Court shall be conclusive as to the validity of any such composition or scheme, and it shall be binding on all the creditors so far as relates to any debts due to them and provable under the bankruptcy." It seems to me that by force of these words a creditor is precluded from suing the bankrupt; we should fly in the face of the words of the statute, if we were to follow the construction suggested by the plaintiff's counsel. The judgment of the Court below was right.

FRY, L.J. It is impossible to assent to the interpretation of the Bankruptcy Act, 1869, s. 28, which has been suggested to us. It is an observation of very great force and of very great weight that upon the construction of the plaintiff's counsel the bankrupt takes no advantage, and in fact is in a worse position than if the proceedings in bankruptcy had gone on, and he had in the ordinary course obtained his discharge.

Appeal dismissed.

Solicitors for plaintiff: *Haynes & Clifton.*
Solicitor for defendant: *E. J. Lewis.*

J. E. H.

[IN THE COURT OF APPEAL.]

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June 5.

SHAW *v.* BENSON AND OTHERS.

Company—Unregistered Company—Loan Society—Association of more than Twenty Members—Association having for its Object the Acquisition of Gain—Gain by Individual Members—Illegality—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 4.

12 QBD 120

T. was the president of a loan society. The objects of the society were to form a fund, from which money might be advanced to enable shareholders to build or purchase a dwelling-house or other buildings, or to lend money to each other on approved personal security; five per cent. interest was to be charged on all moneys advanced by the society. The society consisted of more than twenty members, and was not registered under any statute. The society advanced a sum of money to the defendants, who signed promissory notes by way of security for the loan; and when T. went out of office, he indorsed the promissory notes to the plaintiff, who succeeded him. The plaintiff having sued upon the notes for the benefit of the society:—

Held, that the society not having been registered, was rendered illegal by the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4, it being an association having "for its object the acquisition of gain," within the meaning of that enactment; that the plaintiff could not be in a better position than the society, and therefore could not recover upon the promissory notes.

In re Padstow Total Loss and Collision Assurance Association (20 Ch. D. 137) followed.

Jennings v. *Hammond* (9 Q. B. D. 225), approved.

ACTION by the indorsee of three promissory notes bearing date the 27th of January, 1877, and payable to J. Tetley or order, and indorsed by him to the plaintiff. The makers of the notes were J. Benson, E. Morton, G. Brighouse, and J. Bentley. Two of the notes were for 500*l.* each, and the third for 600*l.* The defendants were J. Benson and the three executors of the will of E. Morton. Various sums had been paid on account of the promissory notes, and the plaintiff claimed a balance of 638*l.* 10*s.* 9*d.*

The cause came on for trial at the Summer Assizes, 1882, held at Leeds, before Mathew, J., without a jury, when the following facts were proved:—

A money club existed in the year 1872, called the Cherry Tree Building Society, and in the course of that year, J. Stoney lent to that society 1200*l.*, and in the following year 430*l.* The

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officers of the Cherry Tree Building Society gave to Stoney, "loan notes," that is, acknowledgments of indebtedness, stating the amount due with 5 per cent. interest. These loan notes were signed by E. Morton, J. Benson, G. Brighouse, and J. Bentley, who all were officers of the Cherry Tree Building Society, and thereby they became personally liable to Stoney. About the same time one Armitage lent to the Cherry Tree Building Society, upon the same security and under the same circumstances, 800*l.* in two sums of 600*l.* and 200*l.*, taking the same acknowledgments. In 1877, these four persons, Morton, Benson, Brighouse, and Bentley, were desirous of getting rid of the transactions between Stoney and Armitage and the Cherry Tree Building Society, and they were desirous that Stoney and Armitage should become the creditors of another club, and they then proposed to Stoney and Armitage, that in place of the loan-notes of the Cherry Tree Building Society, on which they all four were responsible, Stoney and Armitage should take notes to the same amount from a club at Huddersfield, called the Thornhill Arms Commercial and Building Society (hereinafter called the Thornhill Arms Society), and accordingly on the 12th of January, 1877, proposals were made in their name and by their authority to the Thornhill Arms Society, that Morton, Benson, Brighouse, and Bentley should borrow a sum of 2400*l.* from the Thornhill Arms Society, and should become members of it, and should take shares to that amount, and that contemporaneously the loan notes upon which they were personally liable, and which Stoney and Armitage held, should be given up for the purpose of destruction, and that in place of them, Armitage and Stoney should take "loan notes" signed by the officers of the Thornhill Arms Society, who were, amongst others, Tetley, the then president, and Shaw, who succeeded him as the president, and who was the plaintiff in the present action. Armitage was to take two loan-notes for 600*l.* and 200*l.* respectively, and Stoney was to take a loan-note for 1630*l.* This proposal was accepted and carried out, not by the passing of money, but by entries in the books. Stoney and Armitage gave up for the purpose of destruction, the notes held by them upon which Morton, Benson, Brighouse, and Bentley were then liable; these notes were accordingly destroyed. Stoney

and Armitage then accepted loan-notes, upon which Shaw and Tetley, and a person named Hanson, were liable to them. Contemporaneously with this, entries were made in the books of the Thornhill Arms Society, crediting Stoney with 1630*l.* and Armitage with 800*l.*, and debiting Morton with 800*l.*, Benson with 500*l.*, Brighouse with 500*l.*, and Bentley with 600*l.*, and in order to secure these sums, Morton, Benson, Brighouse, and Bentley gave four notes in respect of the loan made to each of them. These four persons became sureties for one another, and the notes sued upon were three of the four given by Morton, Benson, Brighouse, and Bentley. The Thornhill Arms Society paid off the whole of the sum of 800*l.* due to Armitage, and out of the sum of 1630*l.* due to Stoney, had paid off 1030*l.*, leaving a balance of 600*l.* due to him. When Shaw, the plaintiff, was appointed president of the Thornhill Arms Society, Tetley, the former president, indorsed to him the notes sued on, which were held as a security from the borrowers. At the time when the promissory notes sued on were given, the Thornhill Arms Society consisted of more than twenty members, and it was not registered under any statute. The plaintiff sued on behalf of the Thornhill Arms Society, of which he was president. Owing to the mode in which the business of the Thornhill Arms Society was conducted, if it was well managed it would come to an end in seven years, and members who had not borrowed on their shares, would pay at the end of seven years 84*l.* on each 100*l.* share, and a member who had borrowed from the beginning would pay 119*l.*

The rules of the Thornhill Arms Society, so far as they are material, were as follows:—

"2. The objects of this society are by certain monthly payments to form a fund, from which money may be advanced to enable shareholders to build or purchase a dwelling-house or other buildings real or leasehold, or to lend money to each other on approved personal security. The payments shall be at the rate of 1*l.* per month for 100*l.* share, and in the same proportion for any number of shares or proportionate fractional part of a share. The entrance fee shall be 2*s.* per share of 100*l.*, and in proportion for half or quarter of a share. Five per cent. interest shall be charged on all moneys advanced by this society.

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"3. The officers of this society shall consist of president, a vice-president, treasurer, one steward, and seven directors, who shall conduct the business of the society.

"9. The president shall open an account with one of the Huddersfield banks on behalf and on account of the society, and have such advances from time to time as may be agreed upon by the officers and directors.

"15. Whenever the shares in this society cannot be disposed of by sale, the directors shall appoint a ballot for shares unadvanced, which shall be drawn in rotation out of a ballot-box. The names of the members whose shares are unpaid shall be placed in a book in rotation as drawn, and each shareholder shall take one share in such rotation and give security according to these rules or forfeit the sum of 10*s.* per share, or in the same proportion for fractional parts of a share; the shareholder paying this fine shall not be again liable to the ballot in respect of such particular share until the whole of the other unpaid shares are either taken up or have paid the fine.

"17. Any shareholder wishing to withdraw from the society, shall be at liberty to do so at any time and have the amount of his subscriptions returned (except entrance money, all fines incurred, 6*d.* for rules, and 2*s.* per share on withdrawal), by giving two months' notice to the secretary, or may transfer his share or shares on payment of 1*s.* to the secretary.

"18. Should any shareholder die, his legal representatives may continue his subscriptions; but if they do not wish to do so, they must give a month's notice to the secretary, and the officers shall return the subscriptions, except the entrance money and 6*d.* for rules.

"19. Each shareholder shall give notice to the secretary, when he changes his residence in order that the necessary alteration may be made in the register, subject to a fine of 1*s.* in default of such notice.

"20. The security to be taken upon advances shall be good substantial property, freehold, leasehold, and approved personal security, &c., which securities shall be made over to the society in a manner satisfactory to the directors for the time being.

"21. Members may change their securities if the new property

offered as security be approved by the officer and directors, and thereupon the original security shall be cancelled or given up, all expenses to be paid by the member changing the security.

"24. When each shareholder has received the amount of his share or shares, and all claims against this society are settled, the balance in hand (if any) shall be equally divided amongst the shareholders pro ratâ per share by way of drawback, but no shareholder in arrear shall be entitled to share in the drawback."

MATHEW, J., held that the facts proved fell within the principle of *Jennings* v. *Hammond* (1), by which he was bound, and gave judgment for the defendants.

The plaintiff appealed.

June 4, 5. *A. Wills, Q.C.* (*H. Davey, Q.C.*, and *Wilberforce*, with him), for the plaintiff. Two points arise in this case: first, whether the society is illegal under the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4; and secondly, if it is, whether the illegality is any defence to the claim upon the promissory notes. The test whether a demand can be defeated on the ground of illegality, is given in *Simpson* v. *Bloss* (2) and that test does not apply to the present claim, for the plaintiff does not require any aid from the illegal association to establish his case. Moreover, even if the liability to Stoney and Armitage was improperly undertaken, the plaintiff can recover upon the contract contained in the promissory notes; the contract to repay was not illegal: *Coltman* v. *Coltman*. (3)

Arthur Charles, Q.C., and *John Forbes, Q.C.* (*C. Dodd*, with them), were called upon to argue for the defendants. It was illegal for the Thornhill Arms Society to lend money, because they were an illegal association. The objects of the association were illegal, therefore the liability undertaken by the Thornhill Arms Society was illegal, and the contract to repay was illegal. In *Coltman* v. *Coltman* (3) the society itself was legal, and the

(1) 9 Q. B. D. 225. (2) 7 Taunt. 246.

(3) 19 Ch. D. 64.

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trustees had merely committed an unauthorized act; in the present case the association itself was unlawful, and committed unlawful acts. When the Thornhill Arms Society rendered itself liable to Stoney and Armitage, it committed an unlawful act, and the liabilities undertaken for the benefit of the defendants also were illegal. The result is the same as if money had been lent for an illegal purpose; and, in fact, the liabilities were really undertaken for the purpose of carrying on the illegal business of the society. If the plaintiff were allowed to recover, that would be to permit him to take a step in furtherance of the illegal objects of the association: *Jennings* v. *Hammond.* (1)

[LINDLEY, L.J. In *Ex parte Day, In re Day* (2) it was certainly assumed by Bacon, C.J., that an association which was rendered unlawful by the Companies Act, 1862, s. 4, could not prove for a debt due to it under proceedings for liquidation.

BRETT, M.R. Suppose that a cart and a horse belonging to the Thornhill Arms Society is wrongfully taken away, is not an action to be brought for the conversion? suppose that the cart and the horse are stolen, is not the thief to be prosecuted?]

The action for the conversion and the prosecution for the larceny would not be acts done in furtherance of the illegal objects of the society. A court of justice will give no assistance towards carrying out an illegal transaction: *In re South Wales Atlantic Steamship Co.* (3); *In re Padstow Total Loss and Collision Assurance Association* (4); *Rigby* v. *Connol.* (5) The plaintiff is engaged in carrying out the illegal objects of the association; he is an "illegal person," and this circumstance alone vitiates the contract for repayment. The defendants are entitled to go behind the contract contained in the promissory notes; the Thornhill Arms Society ought not to be allowed to do indirectly what they cannot do directly; and upon the facts proved at the trial it is plain that the parties combined to negotiate a loan contrary to the provisions of the Companies Act, 1869, s. 4.

As to the point whether the Thornhill Arms Society are carrying on a "business" having "for its object the acquisition of

(1) 9 Q. B. D. 225.
(2) 1 Ch. D. 699, at p. 702.
(3) 2 Ch. D. 763.
(4) 20 Ch. D. 137.
(5) 14 Ch. D. 482.

gain," it is plain that it is carrying on business for the profit of its individual members. It appears from the rules that there are two classes of members, borrowing members and non-advanced or investing members. If the society is prosperous, the members, or at least the investing members, will get a considerable amount of interest.

A. Wills, Q.C., and *Wilberforce*, in reply. It would be a hardship if the defendants, having received the benefit of a large sum out of the funds of the Thornhill Arms Society, should be exempt from liability to repay it. The liability undertaken for the benefit of the defendants was not for an illegal purpose; the transaction was intended to enable them to pay off a debt, which as against them must be assumed to have been justly due from them. Further, the Thornhill Arms Society was not an illegal association; it was only a kind of savings bank, or a society for making investments. An association of this nature does not carry on a "business" within the Companies Act, 1862, s. 4; it is not rendered illegal by that enactment: *Smith* v. *Anderson* (1); *Wigfield* v. *Potter*. (2) The Thornhill Arms Society does not carry on the business of money lenders; it merely deals with investments as stock jobbers do.

[BRETT, M.R. Stock jobbers carry on a "business."]

The Thornhill Arms Society was not established for the purpose of "gain;" it does not earn any profit, and therefore does not require registration: *Reg.* v. *Whitmarsh* (3); *Moore* v. *Rawlins*. (4) The rules have been framed so as to enable the shareholders to carry out their undertaking without assistance from those who are not members. The object of the society being the encouragement of saving, all the members will receive equal advantage; it is an equal division of savings and nothing else. There is no trading.

[BRETT, M.R. If "individual members" make profits, the association falls within the Companies Act, 1862, s. 4; the words "individual members" were probably inserted to get rid of the decision in *Bear* v. *Bromley*. (5)]

(1) 15 Ch. D. 247.
(2) 45 L. T. (N.S.) 612.
(3) 15 Q. B. 600.
(4) 6 C. B. (N.S.) 289.
(5) 18 Q. B. 271.

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There is no "acquisition of gain" within the meaning of that enactment.

BRETT, M.R. The first point is whether the Thornhill Arms Society is within s. 4 of the Companies Act, 1862, s. 4; if it is, it ought to have been registered, and as it is not registered it is a prohibited and illegal association. We must see whether this society falls within the class forbidden by that statute. It is an "association" of more than twenty persons; that is clear. Then, does it carry on a "business?" The answer to that question must depend upon the inference to be drawn from the facts before us, and upon the subject-matter with which the society was intended to deal. The object of the society is stated in rule 2; the object is to form a fund; that is not a "business." That fund is to be devoted to two purposes: one purpose is that money may be advanced out of it to enable shareholders to build or purchase a dwelling-house or other buildings; the other purpose is to lend money to the shareholders "on approved personal security." Therefore one of the objects of the society is to lend money, and 5 per cent. interest is to be charged on all moneys advanced by the society. If a man lends money to a friend on one occasion, even at interest, he is not carrying on a "business;" but if he forms a fund of 1000*l.* and from time to time lends money out of it, he is then lending money to different persons at interest. Every one would say that this is the "business" of lending money, for it is carried on so long as any profit can be made. The object is to lend money at intervals upon successive contracts; therefore the Thornhill Arms Society carries on a "business." A society is not within s. 4 of the Companies Act, 1862, unless its business has for its object the "acquisition of gain." But the Thornhill Arms Society lends money at interest; therefore it is an association carrying on a "business," having for its object the "acquisition of gain." Perhaps the association itself does not "gain" any profit by the "business," but the individual members do, and this seems to be sufficient to bring the society within the prohibition of the section. It may be said that the words in s. 4 "by the individual members thereof" mean "by *all* the individual members thereof." But if that were the true

construction of the enactment, a mutual marine insurance would not be within its term; and when *In re Padstow Total Loss and Collision Assurance Association* (1) was before this Court, it was held that an association of that kind is within the prohibition of s. 4, and if it is not registered under the statute it cannot be recognised as having any legal existence. The decision which I have mentioned shews that the Thornhill Arms Society is within the enactment, for if each member of an association may acquire a gain, that is sufficient to bring it under the operation of the section. The Thornhill Arms Society carries on a business producing a gain of which each shareholder may partake. The members are divided into members who lend, and members who borrow, money. I do not see what the borrowing members gain; but lending members gain, and each member has the possibility of acquiring gain. Therefore the Thornhill Arms Society is prohibited by the Companies Act, 1862, s. 4, and is illegal.

The second point is that the Thornhill Arms Society is not the plaintiff, and therefore the fact that it is a prohibited association does not arise; but this action is brought by a trustee who sues on behalf of the society, and the plaintiff cannot be in a better position than the society for which he is a trustee.

Thirdly, is the contract illegal? It was contended that an "illegal person" made the contract illegal: that is an argument with which I cannot agree. I cannot carry the doctrine as to illegality so far as that. The question, however, is whether the contract is not in its very nature illegal. The mere contract to lend is not illegal, and the question is whether the contract of the borrowers is not merely a contract to repay money advanced: it seems to me that their contract is not a mere contract of repayment, for the liability was undertaken, and the money was to be repaid according to the rules of the society: therefore the rules of the society form part of the contract for repayment, and as the society is illegal, the contract for repayment also must be illegal. The borrowing and the lending were parts of one transaction, which had for its object the carrying out of the illegal purposes of the society.

This seems a case of some hardship, and I regret that the

(1) 20 Ch. D. 137.

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plaintiff cannot recover; but I consider that this case falls within the principle of *Jennings* v. *Hammond* (1), which was rightly decided.

LINDLEY, L.J. I cannot differ from the judgment of Mathew, J., in the present case. The objects of the Thornhill Arms Society are stated in the rules, and it is impossible not to see that the rules are those of a money-lending society. The Thornhill Arms Society was an "association" formed for the purpose of carrying on a "business," which has for its object the "acquisition of gain." The "gain" perhaps is not that of the society; but some members may gain, for interest is payable on the loans, and the gain goes to the lenders. I should have felt some difficulty about this case, if *In re Padstow Total Loss and Collision Assurance Association* (2) had not been already decided: that case is a binding decision, and so long as it stands, it is an authority in favour of the defendants. The action is on promissory notes, of which the plaintiff is indorsee; but he sues as trustee for the Thornhill Arms Society which seeks to do through him that which it cannot otherwise do. This is not the case of an ordinary loan: we must decide this case upon very dissimilar principles. I see that the consequences of our decision may be productive of hardship; but I do not know how otherwise to decide this case. The appeal must be dismissed.

FRY, L.J. I am of the same opinion. The question is whether the Thornhill Arms Society is illegal under the provisions of the Companies Act, 1862, s. 4. The constitution of the company comes to this, that there are borrowing and lending members; if the society lasts seven years, one member has to pay 119*l.*, and becomes a borrower of money; and another member pays 84*l.*, and borrows no money; the machinery for attaining the objects of the society is complicated; but this is the result. The borrowing member perhaps does not "gain;" but the lending member does "gain." The serious question in this case is whether the business of the Thornhill Arms Society is carried on for "the acquisition of gain." The association itself has no "gain," but the individual

(1) 9 Q. B. D. 225. (2) 20 Ch. D. 137.

members do "gain:" the point has been determined by *In re Padstow Total Loss and Collision Assurance Association* (1): the Court of Appeal there proceeded upon the principle that too minute or hypercritical a consideration of the terms of the Companies Act, s. 4, was not to be adopted. The words of the late Master of the Rolls bring the present case within the operation of that enactment: we ought so to construe the act as to carry out the intention of the legislature. The decision, which I have mentioned, is conclusive upon that point. It follows that the business of the Thornhill Arms Society must be illegal. This does not admit of a doubt, and the point was decided also by *In re South Wales Atlantic Steamship Co.* (2): every contract, which is intended to assist in carrying out the illegal object, must be illegal. The defendants became borrowers from the Thornhill Arms club for the purpose of carrying out the objects of an illegal association; and this action is brought to enforce a contract entered into for an illegal purpose. It is plain that every step which has been taken, was taken to enforce an illegal object. The appeal must be dismissed. The decision in *Jennings* v. *Hammond* (3) was right.

Appeal dismissed.

Solicitors for plaintiff: *Peace & Co., for Learoyd & Co., Huddersfield.*

Solicitor for defendants: *Conrad Fitch, for Edwin Sykes & Son, Huddersfield.*

(1) 20 Ch. D. 137. (2) 2 Ch. D. 763.

(3) 9 Q. B. D. 225.

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June 30.

[IN THE COURT OF APPEAL.]

FRASER *v.* MASON.

Copyhold—Arbitrary Fine—Omission to demand Fixed Sum—Improved Annual Value.

A lord, who is entitled by the custom of the manor to a reasonable fine upon admission to a copyhold tenement, may demand and recover such fine by the description of the improved annual value for a certain number of years of the tenement to which the admittance relates, and without stating in money the precise amount of the fine.

Decision of the Queen's Bench Division (10 Q. B. D. 398) affirmed.

APPEAL by the defendant from the decision of the Queen's Bench Division in favour of the plaintiff.

The pleadings are stated in the report of the proceedings before the Queen's Bench Division (1), and it is here only necessary to say that by a judge's order the following question was stated for the opinion of the Court:

"Whether the lord of a manor, who is by custom of the manor entitled to a reasonable fine on each admittance to a copyhold hereditament, is on the admittance of two lives to a single copyhold hereditament entitled to assess the fine at three years' improved annual value, and, without fixing or assessing any amount or sum certain as the amount of such improved annual value of such fine, to bring an action for the purpose of ascertaining the same and obtaining payment accordingly."

June 11. *Jelf, Q.C.*, and *J. Shiress Will*, for the defendant. The plaintiff in effect contends that the lord of a manor is entitled to fix the amount of the fine payable by the customary tenant, but that if he is wrong in his estimate he may call upon the Court to fix it for him. This contention is opposed to the practice hitherto followed. The procedure suggested casts a hardship upon the customary tenant, because if he does not pay the reasonable amount assessed, the lord perhaps may enter upon

(1) 10 Q. B. D. 398.

the copyhold hereditament as for a forfeiture. A great distinction exists between a fine certain and a fine uncertain or arbitrary; and with respect to fines certain it may be remarked that they are of two kinds: a fine certain may be assessed either at so much an acre, or at so many years' value; but in the present case the fine is arbitrary. Possibly, the lord might assess through the intervention of the homage; but this was a matter lying within his discretion. However, his discretion was fettered by the Courts, who ultimately fixed upon two years' value. The plaintiff's view may be plausible, and at first sight may appear to be reasonable; but he wants that which can be effected only by statute. It was suggested in *Trotter* v. *Blake* (1) that the customary tenant might have relief in equity; but this suggestion does not appear to have been ever acted upon. A fine upon admission might be reasonable, if it was based upon the value of the copyhold hereditament for a certain number of years: *Wharton* v. *King* (2); but the amount must be assessed by the lord before he can maintain an action for it; and in settling the value of a copyhold fine the tenant is not concluded by the amount of the rent which may have been reserved on the premises, but may shew their value to be less: *Lord Verulam* v. *Howard*. (3) It is the duty of the lord to assess the fine at the proper amount, and if he fails to make a correct estimate he cannot either maintain an action for it, *Lord Northwick* v. *Stanway* (4), or enter as for a forfeiture: *Dalton* v. *Hamond* (5); *Wheeler* v. *Honour*. (6) It is not denied for the defendant, that the lord may assess the fine on the improved value, provided he fixes the amount in money: *Halton* v. *Hassell* (7); and it may be admitted that the fine is due to the lord of common right, and that it is for the tenant to shew that it is unreasonable: *Denny* v. *Lemman* (8); *Doe* v. *Muscott*. (9) Until the fine has been assessed, the lord has no cause of action either at law or in equity: *Hayward* v. *Raw*. (10) The plaintiff may rely upon the words of Lord

(1) 2 Mod. 229, at p. 231.
(2) 3 Anst. 659, at p. 674.
(3) 7 Bing. 327.
(4) 3 B. & P. 346.
(5) Cro. Eliz. 779.
(6) Sir T. Raym. 41.
(7) 2 Str. 1042.
(8) Hob. 135.
(9) 12 M. & W. 832.
(10) 6 H. & N. 308; 30 L. J. (Ex.) 178.

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Mansfield, C.J., in *Grant* v. *Astle* (1); but that was a mere obiter dictum, and until this action no attempt has been made to act upon it. The fine must be assessed by the lord at a reasonable amount: Co. Litt. 59b, 60a, and if the demand is exorbitant, it may be assessed by the homage: 1 Watkins on Copyholds, ch. vii. p. 371 (ed. 1825). The plaintiff may rely upon *Lord Holles* v. *Hutchinson* (2); but it does not bear out the suggestion that relief could be had in the Court of Chancery: the original question in the cause appears to have been whether the fines upon alienation and upon descent were the same.

[FRY, L.J. Upon what principle had the Court of Chancery jurisdiction to determine that question?]

A single copyholder could not be relieved in equity for an excessive fine: *Cowper* v. *Clerk.* (3)

[LINDLEY, L.J. In that case it was the copyholder and not the lord who sought relief: the relief was refused, because the copyholder was sufficiently protected at law.

FRY, L.J. In that case either the copyholder was wrong or he did not want equitable relief.]

Anstie, Q.C. (*J. Rose* with him), for the plaintiff. No doubt, in some instances the lord of a manor might have a remedy in equity for the recovery of the fine due on admittance; but it is contended for the plaintiff that he had a remedy at common law, and it was unnecessary to resort to equity for relief: *North* v. *Earl of Strafford.* (4)

[FRY, L.J. In Bacon's Abridg. tit. Copyhold (I.) 3 note, it is said that "the Court and jurors shall be judges of the fine without suit in Chancery; but the modern practice is to resort to equity."]

In the present case the plaintiff merely claims a fine of the improved value of a certain number of years, and it has been held to be a good custom to assess the fine at such an amount as the copyhold lands are worth by the year: *Titus* v. *Perkins.* (5) It was held in *Shuttleworth* v. *Garnett* (6) that an action of assumpsit would lie for a fine; and it follows that it was a mere

(1) 2 Doug. 722, at p. 732.
(2) 3 Sw. 665.
(3) 3 P. Wms. 155.
(4) 3 P. Wms. 148.
(5) Skin. 247; Carth. 12.
(6) Carth. 90.

question of pleading whether the lord should mention the amount of the fine on the face of the declaration. Under the former system of pleading it was a general rule of practice that if a debt could be proved to be due, and if its amount was uncertain, it could be recovered upon a quantum meruit: *Clarke* v. *Westrope* (1); and even a distress would lie for a rent of indefinite amount, but capable of being ascertained with certainty: *Daniel* v. *Gracie* (2); *Ex parte Voisey*. (3) An action can be maintained to recover costs, although the amount has not been ascertained by taxation: *Holdsworth* v. *Wilson* (4); *Metropolitan District Ry. Co.* v. *Sharpe*. (5)

Jelf, Q.C., in reply. The lord has no cause of action until the actual amount of the fine has been ascertained; the sum must be stated in pounds, shillings, and pence. The argument for the plaintiff is in effect that the lord of a manor may ask for as much as he thinks that he can extort from the copyhold tenant, and if the tenant resists the lord may take all that the law will give him.

Cur. adv. vult.

June 30. The following judgments were delivered:—

LINDLEY, L.J. This is an appeal from a decision of the Queen's Bench Division, and the question involved is of substantial importance in the law of copyhold, so far as it relates to the rights of the lord upon the admission of his tenants. The point to be determined is whether the lord of a manor who, by the custom thereof, is entitled to a reasonable fine on the admittance of every customary tenant to a copyhold hereditament, can assess the fine at the improved annual value of a certain number of years, and can maintain an action for the purpose of recovering that fine, without fixing or assessing any amount or sum certain, or whether he is bound to compute the amount of the fine at a correct figure before he brings the action, and whether, if he fails to arrive at a correct computation, he will be unable to recover the amount found to be due, and will be driven to bring a fresh

(1) 18 C. B. 765.
(2) 6 Q. B. 145.
(3) 21 Ch. D. 442.
(4) 4 B. & S. 1.
(5) 5 App. Cas. 425.

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action in order to obtain payment of the proper sum. It ha been contended for the defendant that the lord is bound t compute the amount of the fine accurately, and that he canno recover if a mistake is made in calculating and estimating th amount of the fine. This was the substance of the argumen addressed to us. Various authorities were cited before us bear ing more or less upon the point under discussion; and thes authorities shew that the question is involved in considerabl difficulty. The law in this respect is commented upon an explained in the judgment of Lord Loughborough, given in note to *Grant* v. *Astle* (1), and the remarks there made are ver pertinent for the purposes of the present case; and the passage which I will read begin at p. 727 of the report. "A fine to b paid on the change of a tenant is almost a constant incident of copyhold estate, and it does not seem to have been long befor the end of the reign of Queen Elizabeth that courts of law inter posed to moderate the exercise of the lord's right to a fine wher the custom had left the amount of it uncertain; for it is prett remarkable that a question on this subject was depending in th 36th and 37th of Queen Elizabeth in the Court of King's Bench and in this court at the same time. You will find it in 1 Rolle' Abr. 507, and in the contemporary reporters. The question wa this: under what circumstances a refusal to pay a fine shoul amount, in a court of law, to a forfeiture of the copyhold estate It was contended upon the part of the lord that the mere non payment of the fine assessed would amount to a forfeiture. Tha proposition appeared too strong even in a court of law. Howeve the Court of King's Bench, in the 36th of Elizabeth, held tha after the demand of a fine by the lord, and the refusal of th tenant to pay, though the fine should be unreasonable, the estat should be forfeited. This Court, a term or two afterwards, in th case of *Jackman* v. *Hoddesdon* (2), held that in such a case ther was no forfeiture. The Court of King's Bench (as has been jus stated) had held the contrary, but the opinion of this Court pre vailed; and in the 43rd of Elizabeth, in the case of *Hobart* v *Hammond* (3), the Court of King's Bench, referring to the cas of *Jackman* v. *Hoddesdon* (2), in the Common Pleas, varied thei

(1) 2 Doug. 722. (2) Cro. Eliz. 351. (3) 4 Co. Rep. 27 b.

idea, and held that the refusal to pay an unreasonable fine was no forfeiture of the estate. From the manner in which the report of that case is stated, and the anxiety with which the judges support the proposition, one would be apt to conclude it had not been of great antiquity. A few years afterwards, in the 6th of King James, in *Willowe's Case* (1), this point again occurred, and the law was not then taken to be so settled as for the Court simply to say, "the point is so;" but the report states a great deal of reasoning and argument to support the position that the judges not only might, but ought, either upon the facts appearing upon a demurrer or upon evidence to go to a jury, to determine what was a reasonable fine; and in that case the Court held that two years' value was an unreasonable fine. Thus, then, the matter rested; the fine was to be assessed by the lord, and whether it was reasonable or unreasonable was a question for the consideration of the Court and jury, and it would obviously be subject to much fluctuation and uncertainty. To prove upon a trial the annual improved value of land, and then to calculate how much of that value should be paid for a fine, was likely to be attended with so much dissatisfaction that recourse would frequently be had to the Court of Chancery, which had always relieved against the forfeiture, and taken upon itself, without a jury, to determine what should be a reasonable fine. Lord Keeper Coventry, in the 5th of Charles I., and again in the 12th of the same reign, *Middleton* v. *Jackson* (2) and *Popham* v. *Lancaster* (3), held that one year's improved value was a reasonable fine—guarding the decree—that one year's value should not be counted a fine certain, but referable to the discretion of the Court whether it was reasonable, and that the payment was then directed, because it was reasonable. In the 29th of Charles II., in the year 1677, Lord Nottingham, in the case of *Morgan* v. *Scudamore* (4), held that two years' value was a reasonable fine; and at the time of this determination, in 1677, two years' value was not a much higher payment than one year's value had been at the time of Lord Coventry's determination. The interest of money had been reduced, and from that and other causes the value of land had risen. One year's value might be

(1) 13 Co. Rep. 1.
(2) 1 Chan. Rep. 18 or 33.
(3) 1 Chan. Rep. 51 or 96.
(4) 2 Rep. in Chan. 135.

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nearly as large as an aliquot part of the selling price of land in the 5th of Charles I., as two years' value at the time of Lord Nottingham's determination. From that time to the present the idea of two years' value being a reasonable fine in the case of a fine arbitrary (or, in the more proper phrase 'arbitrable,' Cro. Eliz. 351) has prevailed uniformly, and the adhering to this rule has been a matter of very great convenience, though it cannot be said to be a matter of strict justice."

That historical sketch by Lord Loughborough shews pretty clearly that there was a practice as to the method not only of ascertaining what was a reasonable fine, but also how that was to be assessed; and it was quite clear that it was the duty of the lord to assess what was reasonable. The Court of Chancery ultimately settled the rule, which is now established, that two years' improved value is the reasonable fine, and that explains the passage in *Lord Holles* v. *Hutchinson*. (1) I need not read it here, but it shews that there had been even then a practice in the Court of Chancery to control this matter. I have looked at the cases referred to by Lord Loughborough, but it is unnecessary to comment upon them for the purposes of my judgment. It appears, so far as I can make it out, that the following propositions are clearly established and well settled in the law of copyhold; that the fine must be assessed by the lord or his steward it is his duty and his right to assess it: if the amount is disputed a jury must settle the dispute either in an action asking for a forfeiture, or of trespass for seizure, or in an action for a fine. Before the Judicature Acts, it was held that if the lord assessed too large a sum, that is to say, if he chose to assess the fine in pounds, shillings, and pence, and sued for that, he could not recover what the jury found to be the proper sum in that action, and he had to bring another action. That is plain from *Grant* v. *Astle* (2), and from *Lord Northwick* v. *Stanway* (3) and from *Haywood* v. *Raw* (4). Even in those days it was considered rather strong that the lord should assess the fine at two years' value, and that if he made a mistake in the sum, he could not recover anything and should have his action dismissed with

(1) 3 Sw. 667.
(2) 2 Doug. 722.
(3) 3 B. & P. 346.
(4) 6 H. & N. 308.

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costs, and afterwards should have to run the risk of bringing another action for the right sum. But even when the rules as to pleading were more stringent than at present, if the lord had assessed the fine at two years' value, and had in his action declared for that amount, and had stated the exact sum under a "videlicet," so as to avoid pinning himself down to the exact figures, it seems that he might have recovered what the jury might find to be the proper sum, at least if it did not exceed the amount stated in the declaration. This at least is what I gather from the old authorities on pleading, and particularly from Lord Mansfield's remarks in *Grant* v. *Astle* (1), and also from *Parkyns* v. *Titus* (2), which was much referred to during the argument. If he chose to assess the sum in pounds, shillings, and pence under a "videlicet," the lord would not necessarily fail. If that is the true view, then it becomes a mere question of pleading, and certainly, it being a mere question of pleading, it would be rather strong, not to say monstrous, to hold that if the lord assessed the sum at two years' improved value and overestimates for that matter the exact amount, he is driven not only to lose the action which he brings for his fine, but also to commence a fresh action. When we look at the sense of the thing, I do not think it will be found to come to this, that the lord is bound to assess his fine in pounds, shillings, and pence to the last farthing. It appears when we look at it, as men of business, that the person who pays the fine is generally a purchaser. It is quite true that if the lord does assess the sum, he may find himself in a difficulty; but it appears to me perfectly in accordance with the old authorities and in accordance with the modern view that if he assesses the fine at two years' improved value, and claims the amount under a "videlicet" in such a way as not to pin himself to it, he can recover. One of the cases, *Lord Northwick* v. *Stanway* (3), goes this length—that if he assesses the fine at 100*l.*, and then waives 40*l.* and claims 60*l.* in his action, still as he had assessed it too high, he could not recover the 60*l.* I quite agree that that does not affect the principle of the law as to copyhold.

(1) 2 Doug. 722.

(2) Carth. 12.

(3) 3 B. & P. 346.

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For the reasons which I have given, I think it tolerably plain that if the lord takes the precaution of assessing the fine at two years' improved value, he can recover that amount even although he does not pin himself down in the action to pounds, shillings, and pence. It appears to me, therefore, that the view taken by the Divisional Court was right, and that this appeal ought to be dismissed with costs.

FRY, L.J. The question which arises in this appeal is stated in this manner by a judge's order: "Whether the lord of a manor, who is by custom of the manor entitled to a reasonable fine on each admittance to a copyhold hereditament, is on the admittance of two lives to a single copyhold hereditament entitled to assess the fine at three years' improved annual value, and, without fixing or assessing any amount or sum certain as the amount of the improved annual value of such fine, to bring an action to recover and obtain payment of it." That question has been answered in the affirmative by the Divisional Court. The question arises in this way: by the law the fine must be a certain, fixed, legal sum, assessed and demanded by the lord, and the assessment must therefore be one of reasonable certainty, and the question is what certainty is necessary and reasonable in the assessment of the fine. Now we all know that the certainty required in different cases varies. It is an old observation of a very wise man that exactitude is to be sought in different subjects and in different sciences with reference always to the subject matter of the inquiry; and so in law there are degrees of certainty, and the inquiry is whether the matter to be reduced to certainty has been reduced to a certainty adequate for the occasion. In the present case it will be borne in mind that the improved value of property is more within the knowledge of the tenant, or the purchaser, or of the heir, than it is of the lord. So far as I am aware, the lord had no right of entry to survey the property, except indeed under the jurisdiction, possibly, of the Court of Chancery. The lord had no means to obtain discovery except, possibly, through the intervention of a similar proceeding, and therefore he was placed at a great disadvantage in assessing the exact amount of the annual value of the property. On principle,

therefore, it would appear to me that the reduction to certainty by expressing the improved value for a number of years would be adequate to the occasion.

Now turning from principle to authority, I would in the first place refer to the passage in Co. Litt. 96a, which lays down a general principle with regard to the required certainty: "It is a maxim in law that no distress can be taken for any services that are not put into certainty, nor can be reduced to any certainty; for, id certum est, quod certum reddi potest; for oportet quòd certa res deducatur in judicium; and upon the avowry, damages cannot be recovered for that which neither hath certainty, nor can be reduced to any certainty. And yet in some cases there may be a certainty in uncertainty; as a man may hold of his lord to shear all the sheep depasturing within the lord's manor; and this is certain enough, albeit the lord hath sometime a greater number, and sometime a lesser number there; and yet this uncertainty being referred to the manner which is certain, the lord may distrain for this uncertainty." Now the awkward expression "certainty in uncertainty," is only another method of saying that which I have expressed; that the certainty is only that which is required for the purpose in hand. Now it appears to me that there is one authority which shews that this is sufficient certainty for the purpose of a fine. The case to which I refer is *Parkyns* v. *Titus*. (1) It was an action of trespass for entering the plaintiff's close. The defendant pleaded that he in his own right, and as bailiff of the Earl of Essex, was justified in entering. The plaintiff replied, setting out that the parcels of land in question were copyhold. The defendant rejoined that that was true, but that the copyhold lands were of the yearly value of 28*l.*, and that the lords by their stewards had set a fine of 35*l.* on the admittance of the plaintiff, and averred that the same was a reasonable fine. The plaintiff surrejoined that the 35*l.* was not a reasonable fine, and said there had been a custom in the manor that any person who should be admitted tenant should pay and ought to pay to the lord of the manor a certain fine; namely, "tantam denariorum summam quantam terræ vel tenementa valebant per annum tempore talis admissionis et non ampliùs,

(1) Carth. 12.

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and that the lands, &c., were of the value but of 28*l.* per annum at the time the plaintiff was admitted, which 28*l.* he tendered to the defendant himself being then in court, but he refused to accept it. The defendant demurred, pretending that this was a a frivolous custom, and not good for the incertainty, because the value of the land is always incertain, sometimes of a greater and sometimes of a less value, and so there cannot be any certainty of the sum which the lord is to have for a fine; but it is in the power of the tenant to make the fine of a very low value by not cultivating the land." Then there was another objection taken on the form of the pleading to which I need not refer, but the judgment was that the custom was good and reasonable. Therefore a fine assessed at one year's value was held to be of sufficient certainty. In substance I am unable to find any difference between that case and the present.

But the matter does not appear to me to rest there on authority. By the case of *Shuttleworth* v. *Garnett* (1) which was determined in the 4th year of James II., it is established that the lord could recover a fine by an indebitatus assumpsit, and the moment that was determined, it appears to me that the lord might have claimed the fine as being two years' improved value of the land and have alleged the amount which he claimed under a videlicet, and that the effect of that would have been that the gist of the action would have been the demand for the two years' improved value, and that he would not have failed in the action even if he had wrongly assessed those two years' value at the sum which he named. In corroboration of that view I will refer to what Lord Mansfield said in the case of *Grant* v. *Astle* (2), "This action is for a certain precise sum, and under the circumstances of the case it could not be brought in any other way. The cases cited for the plaintiff, namely, of debt on a foreign judgment; or against a tenant for double the value of the land, when he holds over under the statute of 4 Geo. 2, c. 28; or for treble the value for not setting out tithes, under the statute of Edward VI.; or of assumpsit for a total loss on a policy of insurance, when there has been only a partial loss, are not at all applicable to the present case; for, in all of those, the gist of the

(1) Carth. 90.

(2) 2 Doug. 722, at p. 732.

action is supported and a case proved consistent with the declaration, those actions being not for a precise sum, but for a sum in proportion to what the jury shall find to be the value or the damage." Now, it appears to me, that in such a form of action as I have suggested the gist of the action brought by the lord is for two years' improved value, and in indebitatus assumpsit that might have been maintained. It appears to me, further, that the Common Law Courts did in old times entertain a jurisdiction to ascertain the improved value for a number of years at which the fine might have been assessed, and I think also to ascertain the quantum of fine. Upon that mode of calculation it appears to me, as far as I can gather, that the one function, namely, that of ascertaining how many years' improved value was to be the fine, was assumed by the judge, and that the ascertainment of the quantum was left to the jury. I come to that conclusion from the passage in *Willowe's Case* (1), which although it is not very clear, appears to me to bear that meaning: "It was resolved that if the lord and tenant cannot agree of the fine, but the lord demandeth more than a reasonable fine, the same shall be decided and adjudged by the Court, in which any suit shall be for or by reason of the denying of the fine, and the Court shall adjudge what shall be said to be a reasonable fine having regard to the quality and value of the land, and other necessary circumstances which ought to appear in pleading upon a demurrer, or found by verdict."

Now it appears to me that when the fine is to be assessed, not only with regard to what is reasonable, but with regard to the quality and value of the land, it must import that both the elements of the reduction of the fine to ultimate certainty must have been considered. But whether that were so or not in the Common Law Courts, it appears that there was such a jurisdiction in the Court of Chancery. I come to that conclusion from referring to the numerous old cases which were more or less referred to during the course of the argument, but especially to the decision in *Lord Holles* v. *Hutchinson* (2) in the 31st of Charles II. That case is fully reported from Lord Nottingham's notes, and the case is a remarkable one. It appeared that there had been three

(1) 13 Rep. 1, at p. 3.

(2) 3 Sw. 665.

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decrees made with regard to the manor and the fines of that manor. The first had been made in Lord Bacon's time, when the fines were ascertained at two years' value on an alienation and a year-and-a-half's value upon descent or alienation to wife or children. The second decree had been in the time of Lord Chancellor Bromley, which was to explain the former decree, upon a complaint that the lord took upon himself to judge the values, whereupon the Chancellor issued out a commission to survey the value of every tenement. I pause there to observe that Lord Chancellor Bromley, following apparently the determination of Lord Bacon, did not content himself with ascertaining the improved value for a certain number of years on which the fine was to be calculated, but proceeded to ascertain the value of the tenements in respect of which the fine was to be paid. Upon the return of the commission the decree was drawn up by consent to make this survey the binding and perpetual measure as to the values. Two former decrees, including the one which directed an assessment of the actual value of the tenements, were not made by consent. The third decree making that the perpetual measure was by consent. The question, which came before Lord Nottingham, was whether he could set aside or grant relief against the assessment which had been made perpetual by consent, and he did so. The decision is therefore a very strong one; and Lord Nottingham applied his mind to find every possible fault with the course which had been taken in order to relieve himself from the consent which had been given. Amongst other grounds of objection to the third decree, which was one by consent, he made this observation: "3. There are many precedents in this Court, whereby fines uncertain have been reduced to a reasonable estimate or value, but this second decree is the first precedent whereby uncertain values were made certain and perpetual by a survey." Now the force of Lord Nottingham's remark there is against the perpetuity of the assessment, and that appears from this fact, that he himself, relieving against that perpetual ascertainment of the exact values, issued a new commission and directed a new survey. For what purpose? Not to ascertain the number of years' improved value at which the fine was to be assessed, but to ascertain the quantum of those fines.

Now the last observation which he makes shews what he did: "10. The only difficulty which remains with me is that the bill doth not pray to vacate the decree, or to set it aside, but only to amend the defects of the survey, and that a new commission may be awarded to that purpose; that to open a new survey the time, state, and value of all the tenements may be known; now, though this kind of remedy will be necessary to be renewed every thirty or forty years, yet since no decree can go beyond the prayer of the bill, I award such a commission and will consider of the further settlement at the return of that commission." Therefore his Lordship actually awarded a commission for the purpose of ascertaining the value in money of each of the tenements, and thereby of ascertaining the fine payable in respect of each tenement. But that is, in my judgment, a distinct assertion in a case, after careful consideration, of the jurisdiction of the Court of Chancery to assess the precise amount of fines.

I have only one further observation to make: it appears to me that if we had yielded to the objection which has been made in this case, we should have been acting in violation of the principles laid down for the guidance of the Courts in the Judicature Act, 1873, s. 24, subs. 7. For these reasons I agree that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for plaintiff: *Needham, for E. & A. Caddick.*
Solicitors for defendant: *Taylor, Mason, & Taylor.*

J. E. H.

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July 5.

[IN THE COURT OF APPEAL.]

MUNSTER *v.* LAMB.

Defamation—Privilege—Words uttered in the course of a Judicial Proceeding—Advocate—Relevancy—Malice.

No action will lie against an advocate for defamatory words spoken with reference to, and in the course of, an inquiry before a judicial tribunal, although they are uttered by the advocate maliciously and not with the object of supporting the case of his client, and are uttered without any justification or even excuse and from personal ill-will or anger towards the person defamed arising out of a previously existing cause, and are irrelevant to every issue of fact which is contested before the tribunal.

H. was charged before a court of petty sessions with administering drugs to the inmates of M.'s house in order to facilitate the commission of a burglary at it. M. was the prosecutor, and L., who was a solicitor, appeared for the defence of H. There was some evidence, although of a very slight character, that a narcotic drug had been administered to the inmates of M.'s house upon the evening before the burglary, and H. had been at M.'s house on that evening. During the proceedings before the court of petty sessions, L., acting as advocate for H., suggested that M. might be keeping drugs at his house for immoral or criminal purposes. There was no evidence that M. kept any drugs for those purposes:—

Held, that no action by M. for defamation would lie against L.

Kendillon v. *Maltby* (C. & M. 402; 2 M. & R. 438) dissented from.

ACTION for words spoken by an advocate in defending a client.

Statement of claim. 1. The plaintiff is a barrister-at-law having, amongst others, a residence at Sillwood Lodge, Brighton.

2. In or about March, 1881, the plaintiff's dwelling-house at Sillwood Lodge was burglariously entered, and William Hill and Ellen his wife were tried before the recorder of Brighton on the charge of committing the burglary, and William Hill was convicted, and Ellen Hill was acquitted on the ground that she had acted under the influence of her husband.

3. The said Ellen Hill was on the 9th of June, 1881, charged at the Brighton petty sessions with having unlawfully administered soporific drugs to the plaintiff's servants.

4. The defendant then falsely and maliciously spoke and published of and concerning the plaintiff the words following,—"He" (meaning the plaintiff) "has put her" (meaning the said

Ellen Hill's) sister into a convent to shut her mouth" (meaning thereby that the plaintiff had caused a sister of the said Ellen Hill to be placed and kept in a convent against her will and in order to prevent her from giving evidence at her said sister's trial, or from disclosing that the plaintiff had been guilty of a criminal offence, as he the defendant in fact meant that the fact was, or from making other statements damaging to the plaintiff's character and reputation, as he the defendant meant might truthfully be made).

5. And the defendant then spoke and published falsely and maliciously of and concerning the plaintiff, "I have my own opinion for what purposes all these young women are resident in the house of Mr. Munster" (meaning the plaintiff). "I" (meaning the defendant) "can believe that there may have been drugs in Mr. Munster's house: and I have my own opinion for what purposes they were there and for what they may have been used" (meaning thereby that the plaintiff had kept and used, and was accustomed to keep and use, drugs for the purpose of obtaining or of facilitating criminal connection or for the purpose of procuring abortion, or for some other criminal and immoral purpose).

6. The plaintiff has by reason of the premises been greatly injured in his credit and reputation, &c.

Statement of defence. The defendant admits that, on the 9th of June, 1881, Ellen Hill was charged at the Brighton petty sessions with the committing an offence under 24 & 25 Vict. c. 100, s. 23. The plaintiff was the prosecutor, and the stipendiary magistrate of the said court had jurisdiction to hear the said charge.

2. The defendant denies that he spoke or published maliciously or otherwise the words alleged in the statement of claim, or any of them, either with or without the innuendoes therein specified, and, save as aforesaid, denies specifically the several allegations in the statement of claim.

3. As an alternative defence, the defendant repeats the allegations in the first paragraph of the statement of defence, and says that, when the alleged words were uttered, he was a solicitor, and as such solicitor was engaged in defending the said Ellen Hill before the stipendiary magistrate of the said Court upon the said

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charge. The alleged words were spoken (if at all) while he was engaged as such advocate as aforesaid, and in the capacity of advocate, and not otherwise.

Issue thereon.

The cause was tried before Watkin Williams, J., at the sittings for Middlesex, and the following is the substance of the facts proved at the trial.

On the 9th and 17th of June, 1881, at the petty sessions for the borough of Brighton, Ellen Hill was charged with administering drugs in order to enable a felony to be committed. The plaintiff in the present action was the prosecutor, and the defendant, Lamb, who was a solicitor, appeared for the defence of Ellen Hill. The prosecutor's house was feloniously broken into and entered at the end of February, 1878, and several articles were stolen. The prosecutor did not then reside at the house, but three women, namely Ellen Mockford, and two sisters named Cartwright, were staying at the house, and a man named Hatch called at the house in the evening preceding the burglary. The accused, Ellen Hill, was at the prosecutor's house upon the evening in question. Beer was drunk by the three women and the man, Hatch. At the hearing of the charge before the petty sessions they all were called, and in giving their evidence deposed that after drinking the beer they felt drowsy and sleepy. It was suggested on behalf of the prosecution that Ellen Hill had drawn the beer and had put some narcotic drug into it, in order to throw the inmates of the house into a deep sleep, and thereby to facilitate the commission of the burglary. In the course of the proceedings against Ellen Hill, the defendant Lamb, acting as her advocate, said: "I have my own opinion for what purpose all these young women may have been resident in the house of Mr. Munster. I can believe that there may have been drugs in the house of Mr. Munster, and I have my own opinion for what purpose they were there, and for what they may have been used." It was alleged on behalf of the plaintiff that the defendant by using these words meant that the plaintiff had kept and used and was accustomed to keep and use, drugs for the purpose of obtaining or of facilitating criminal connection, or for the purpose of procuring abortion, or for some other criminal and

immoral purposes. The charge against Ellen Hill was dismissed by the court of petty sessions.

Watkin Williams, J., was of opinion that the words above mentioned were privileged, having been used by the defendant as advocate for Ellen Hill before a court holding a judicial inquiry, and directed a nonsuit.

An order nisi was afterwards obtained for a new trial, on the ground of misdirection and that the verdict was against the weight of evidence.

May 5, 1883. *Gore* (*E. Clarke, Q.C.*, with him,) shewed cause. *Waddy, Q.C.*, and *Woollett*, in support of the order.

The facts and arguments are sufficiently stated in the judgment.

The following authorities were cited and commented upon:— *Reg.* v. *Skinner* (1); *Brook* v. *Montague* (2); *Robinson* v. *May* (3); *Flint* v. *Pike* (4); *Hodgson* v. *Scarlett* (5); *Needham* v. *Dowling* (6); *Revis* v. *Smith* (7); *Henderson* v. *Broomhead* (8); *Mackay* v. *Ford* (9); *Kennedy* v. *Hilliard* (10); *Scott* v. *Stansfield* (11); *Dawkins* v. *Lord Rokeby* (12); *Seaman* v. *Netherclift.* (13)

Cur. adv. vult.

May 7. MATHEW, J. This was an action brought by Mr. Munster, a barrister, against Mr. Lamb, a solicitor, for defamatory expressions which were said to have been used by Mr. Lamb while acting as advocate for a woman of the name of Hill, against whom criminal proceedings had been instituted by Mr. Munster.

The cause came on for trial before my Brother Williams; and at the conclusion of the plaintiff's evidence his Lordship was of opinion that there was no case which ought to be submitted to the jury. A rule was subsequently obtained by Mr. Woollett to set that nonsuit aside; and we have how to say how that rule should be disposed of.

(1) Lofft, 55.
(2) Cro. Jac. 90.
(3) 2 Smith, R. 3.
(4) 4 B. & C. 473.
(5) 1 B. & A. 232.
(6) 15 L. J. (C.P.) 9.
(7) 18 C. B. 126; 25 L. J. (C.P.) 195.
(8) 28 L. J. (Ex.) 360.
(9) 5 H. & N. 792; 29 L. J. (Ex.) 404.
(10) 10 Irish C. L. R. (N.S.) 195.
(11) Law Rep. 3 Ex. 220.
(12) Law Rep. 8 Q. B. 255; 7 H. L. 744.
(13) 1 C. P. D. 540; 2 C. P. D. 53.

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The circumstances which gave rise to the action were these:—It appears that in the year 1881, a prosecution had been instituted by Mr. Munster against a woman named Hill and her husband for a burglary alleged to have been committed at Mr. Munster's house. At the trial the male prisoner pleaded guilty, and the woman was acquitted. Shortly afterwards another prosecution was commenced by Mr. Munster against the woman, and the charge made against her was, that, in the year 1878, she had, with a view of facilitating the commission of a burglary in Mr. Munster's house, administered to his servants a narcotic drug. Now, the charge which was made by Mr. Munster came on in the first instance before the magistrate at Brighton on the 9th of June, and upon that occasion (without going into the evidence which was given), it seems sufficient for the present purpose to say that the charge then made broke down as against the defendant, and upon that an application was made on behalf of the prosecutor for a remand, in order that further evidence might be obtained. In resisting that application Mr. Lamb made use of the expressions which were the subject of the first complaint in this statement of claim. In pointing out the danger to which his client would be exposed if an adjournment were granted that further evidence might be procured against her, Mr. Lamb made use of the expression that the prosecutor had spirited away upon some former occasion the sister of the accused person, and had shut her up in a convent in order that she might be prevented from giving evidence. This absurd remark does not appear to have been called to the attention of the presiding magistrate, or to have been noticed by him in any way. It is unnecessary for us now to deal with that part of the plaintiff's case, because Mr. Waddy in the course of his argument very wisely and properly abandoned any cause of complaint in respect of that. It was very questionable whether the words used were defamatory per se. If they were, they appear to come within the probable instructions which the advocate might have received from his client, and therefore, on the narrowest view of the privilege of the advocate, he would be protected from an action.

The application that was made for a remand was successful, and the prisoner was brought up again on the 17th of June, and

upon that occasion further evidence was offered in support of the charge made by the prosecutor; and a Miss Cartwright was called; and it is only necessary to refer to one fact which appears to have been elicited from her, namely, that at the time when the offence was stated to have been committed there were several young persons,—young women,—resident in Mr. Munster's house. It is only fair to Mr. Munster to say further that the same witness proved that at that time Mr. Munster was not resident in the house. Miss Cartwright gave further evidence in support of the suggestion that the prisoner had administered some narcotic to her and the other servants in the house on the occasion in question. Then the matter was submitted to the magistrate; and, when the evidence which had been given was alleged to be sufficient to justify the prisoner's being committed for trial, it became the duty of Mr. Lamb to resist the application made on the part of the prosecution; and in the course of his observations to the magistrate he made use of the expressions which were the subject of the second complaint in the statement of claim. He appears to have considered it to be his duty to account for the presence of some narcotic in the house of the prosecutor, Mr. Munster, and to have suggested that a narcotic might have been brought to the house by Mr. Munster himself, with the intention of using it for some immoral or some criminal purpose. On these words,—which are set out in the statement of claim,—the action was subsequently brought by Mr. Munster.

The learned counsel for the defendant, who argued the case with great propriety and ability, did not attempt to justify or excuse the expressions used by him. It was impossible to do so. The imputation cast upon Mr. Munster was altogether unfounded and absurd. The language of the defendant, if used by an advocate in a superior Court, would most certainly have led to a sharp reprimand from the presiding judge. The magistrate to whom the observations of the defendant were addressed does not appear to have noticed them,—probably because he thought they were so unreasonable as not to deserve attention. The counsel for the defendant, while not disputing the impropriety of the defendant's conduct, at the same time insisted that his words were protected from being made the subject of an action, by

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reason of his privilege as an advocate. He argued that the language of an advocate, however unbecoming or ill-advised, is not actionable so long as he speaks in good faith and in the discharge of what he honestly considers to be his duty towards his client. He relied upon the decisions from *Rex* v. *Skinner* (1) down to *Dawkins* v. *Lord Rokeby* (2), in which the privilege of counsel is treated as similar to that of the judge and the witness, and is referred to the same principle, viz. that it is indispensable in the interest of suitors that those who take part in a trial should be free and independent in the discharge of their duty, and to that end their conduct should not be subject to be called in question by a jury upon a subsequent trial.

As against this view it was argued by Mr. Waddy that the privilege of counsel was less than that of judge or witness. He contended that the duty of counsel was, to state to the Court with critical accuracy what was contained in his instructions, and to comment fairly and reasonably upon the evidence given in the case; and for any departure from the line of his duty, of which it was said a jury were the proper judges, he insisted the counsel ought to be liable to an action. In support of this view, Mr. Waddy mainly relied upon the cases of *Flint* v. *Pike* (3) and *Hodgson* v. *Scarlett* (4) and a passage in the judgment in *Seaman* v. *Netherclift*. (5) But it seems to me there is no authority for Mr. Waddy's position. Mr. Waddy pointed out,—what is greatly to the credit of the Bar of England,—that in no case in which the conduct of a barrister had been called in question in an action had there been any difficulty in shewing that the language of counsel had been relevant to the matter in dispute in the strictest sense. But he failed to satisfy me that in a case in which this strict relevancy could not be proved the advocate would not be protected. The privilege is not needed when the advocate is in the right.

It may be inconvenient to individuals that advocates should be at liberty to abuse their privilege of free speech, subject only to animadversion or punishment from the presiding judge. But

(1) Lofft, 55.
(2) Law Rep. 8 Q. B. 255; 7 H. L. 744.
(3) 4 B. & C. 473.
(4) 1 B. & A. 232.
(5) 1 C. P. D. 540; 2 C. P. D. 53.

it would be a far greater inconvenience to suitors if advocates were embarrassed or enfeebled in endeavouring to perform their duty by the fear of subsequent litigation. This consequence would follow, that no advocates could be as independent as those whose circumstances rendered it useless to bring actions against them. The passage in *Seaman* v. *Netherclift* (1) upon which Mr. Waddy relied was not, as it seems to me, intended to qualify the statement of the law contained in the earlier judgments relied upon for the defendant. All that was intended to be laid down was this, that, for defamatory statements made by an advocate outside his office of advocate and with no reference to the subject before the Court, and which therefore were necessarily made in bad faith and were irrelevant, a counsel might be proceeded against in an action.

In this case, the expressions complained of seem to me to have been within the line indicated by the authorities as the boundary of the advocate's privilege. I therefore think the ruling of the learned judge at the trial was correct, and that this rule should be discharged.

A. L. SMITH, J. I am of the same opinion.

Rule discharged.

J. S.

The plaintiff appealed.

July 3, 5. *Waddy, Q.C.*, and *Woollett*, for the plaintiff. The defendant by uttering the words complained of exceeded his privilege as an advocate, for they were irrelevant to the proceedings before the police court, there being no evidence that the plaintiff, Munster, had any drugs. An advocate is protected from an action for defamation only when the words which he utters are spoken bonâ fide, and are relevant to the matters before the Court. The foundation of the doctrine as to the privilege of an advocate is to be found in *Brook* v. *Montague* (2): it was there laid down that he had only a privilege as to what he was informed by his client, "it being pertinent to the matter in question." In 1 Roll. Abridg. 87, this view of the decision is

(1) 1 C. P. D. p. 545, per Lord Coleridge, C.J. (2) Cro. Jac. 90.

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adopted. (1) The same restriction upon the privilege, namely, that the words must be pertinent to the issue, was stated in *Hodgson* v. *Scarlett*. (2) It was for the jury to say whether the defendant was acting maliciously and from motives of his own. No duty had been cast upon the defendant to utter the words complained of, and therefore he is not protected by his privilege as an advocate: *Robinson* v. *May*. (3)

[FRY, L.J. That case has not much bearing on the question before us.]

It may be that Bayley, J., in *Flint* v. *Pike* (4) treats the privilege of counsel as absolute; but in *Needham* v. *Dowling* (5) it appears that Maule, J., was of opinion that counsel are protected only when their words are pertinent. And this was the ground of the decision in *Mackay* v. *Ford* (6), which no doubt establishes that a solicitor acting as an advocate has the same privilege as counsel. The reasons given by the judges would have been wholly unnecessary if the privilege of an advocate were absolute, and some decisions in the Irish courts take the same limited view of the privilege of an advocate: in *Butt* v. *Jackson* (7) Blackburne, C.J., appears to have been of opinion that the rights of counsel are not uncontrolled, and are not greater than those of their clients; and in *Higginson* v. *O'Flaherty* (8) it was pointed out that the privilege exists only if the words are relevant. Possibly a wider view of the extent of the privilege was taken in *Kennedy* v. *Hilliard*. (9)

[BRETT, M.R. It may be said that the privilege of a counsel is absolute, because he speaks in the presence of a judge who can check him if he says what is improper.

FRY, L.J. A barrister may be checked or reprimanded by the judge if he misconducts himself in court. (10)]

(1) See 3 Bl. Com. ch. iii. p. 29; 3 Steph. Com. bk. v. ch. iii. p. 277 (8th Ed.).

(2) 1 B. & Ald. 232.

(3) 2 Smith (K. B.), 3.

(4) 4 B. & C. 473, at p. 478.

(5) 15 L. J. (C.P.) 9.

(6) 5 H. & N. 792; 29 L. J. (Ex.) 404.

(7) 10 Ir. Law Rep. 120, at pp. 123, 124.

(8) 4 Ir. Com. Law Rep. (N.S.) 125.

(9) 10 Ir. Com. Law Rep. 195.

(10) A barrister may be punished for contempt of court, even for language professedly used in the discharge of his functions as advocate: *Ex parte Pater*, 5 B. & S. 299; 33 L. J. (M.C.) 142.

The plaintiff has been defamed, and has primâ facie a cause of action; the defendant, who has defamed him, must fail in his defence, unless he can produce either some statute or some previous decision directly in point which will justify his conduct. Cases have occurred, in which it has been decided that the protection of privilege extends to judges, parties, and witnesses; but even these are not protected, if they speak without relevancy and with malice. It is true that *Scott* v. *Stansfield* (1) goes to shew that an action for slander is not maintainable under any circumstances against the judge of a court of record; but the decision is hardly consistent with the opinion of Cockburn, C.J., in *Thomas* v. *Churton.* (2) It has been held in the House of Lords that, according to the law of Scotland, an action for damages was not competent against a supreme judge for a censure passed by him, while acting in his judicial capacity, on a counsel practising at the bar, and engaged in the cause then before the court, although it was alleged that the censure had been made injuriously and from motives of private malice: *Miller* v. *Hope* (3); but in *Allardice* v. *Robertson* (4) Lord Wynford expressed an opinion that a subordinate judge is liable to an action for slander, if malice is clearly made out. And in England it was held by Lord Denman, C.J., at Nisi Prius, in *Kendillon* v. *Maltby* (5), that the highest judge in the land is answerable in damages for slanderous language not relevant to the cause before him. Witnesses are privileged only so long as their evidence is not scandalous, false, or malicious: *Revis* v. *Smith* (6); *Henderson* v. *Broomhead.* (7) It is true that Lord Mansfield said in *Rex* v. *Skinner* (8) that "neither party, witness, counsel, jury, or judge can be put to answer, civilly or criminally, for words spoken in office;" and in *Dawkins* v. *Lord Rokeby* (9) Kelly, C.B., in delivering the judgment of the Exchequer Chamber, said: "The authorities are clear, uniform, and conclusive, that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties for

(1) Law Rep. 3 Ex. 220.
(2) 2 B. & S. 475, at p. 479.
(3) 2 Shaw, App. Cas. 125.
(4) 1 Dow. & Cl. 495, at p. 515.
(5) Car. & M. 402; 2 M. & R. 438.
(6) 18 C. B. 126; 25 L. J. (C.P.) 195.
(7) 4 H. & N. 569; 28 L. J. (Ex.) 360.
(8) Lofft, 55.
(9) Law Rep. 8 Q. B. 255, at p. 263; affirmed, Law Rep. 7 H. L. 744.

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words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law." And a subsequent passage in the judgment (1) is to the same effect. But these expressions of opinion are mere obiter dicta as to the privilege of counsel. *Rex* v. *Skinner* (2) was the case of an indictment against a justice of the peace; and *Dawkins* v. *Lord Rokeby* (3) was an action against a witness. In *Seaman* v. *Netherclift* (4) it was said by Lord Coleridge, C.J., that "it has never yet been decided that" counsel "would not be subject to an action for words spoken even during the conduct of a case if the words were irrelevant, malâ fide, and spoken with express malice." It was for the defendant to shew that he was privileged. *Clark* v. *Molyneux* (5) is not applicable to the facts of this case. No other cases referring to the privilege of counsel seem to exist besides those already mentioned. The words complained of did not refer to the case that was being heard by the justices: they were defamatory and uncalled for comments upon the character of the witnesses.

[FRY, L.J. The defendant's observations cast a reflection upon the women who were inmates of the prosecutor's house, and who were called as witnesses: his remarks may have been improper; but in one sense they were not irrelevant.]

The only issue before the court of petty sessions was the defence of not guilty; the evidence of the women was accepted and not challenged: it was part of the case for the defence that no one had been drugged on the night when the house was broken into. If the defendant is protected in the present case, the protection to an advocate, whatever he may say, will be absolute and unqualified; for the statement made by the defendant, of which the plaintiff complains, was a mere invention, or, at least, a mere suggestion of the defendant's imagination.

E. Clarke, Q.C. (*Gore*, with him), for the defendant, was stopped.

BRETT, M.R. We need not call upon the counsel for the defendant.

(1) Law Rep. 8 Q. B. at p. 268.
(2) Lofft, 55.
(3) Law Rep. 8 Q. B. 255.
(4) 1 C. P. D. 540, at p. 545; affirmed, 2 C. P. D. 53.
(5) 3 Q. B. D. 237.

The counsel for the plaintiff have given very great assistance to the Court, because not only have they gone through the cases which can be said to support the proposition that they are called upon to maintain, but also, as far as I can judge, they have cited all the cases which have any bearing upon the matter. These cases have been fully discussed, and without calling upon the defendant's counsel we are prepared now to give judgment.

This action is brought against a solicitor for words spoken by him before a court of justice, whilst he was acting as the advocate for a person charged in that court with an offence against the law. For the purposes of my judgment, I shall assume that the words complained of were uttered by the solicitor maliciously, that is to say, not with the object of doing something useful towards the defence of his client: I shall assume that the words were uttered without any justification or even excuse, and from the indirect motive of personal ill-will or anger towards the prosecutor arising out of some previously existing cause; and I shall assume that the words were irrelevant to every issue of fact which was contested in the court where they were uttered; nevertheless, inasmuch as the words were uttered with reference to, and in the course of, the judicial inquiry which was going on, no action will lie against the defendant, however improper his behaviour may have been.

It has been contended that as a person defamed has, primâ facie, a cause of action, the person defaming must produce either some statute or some previous decision directly in point which will justify his conduct. I cannot agree with that argument. The common law does not consist of particular cases decided upon particular facts: it consists of a number of principles, which are recognised as having existed during the whole time and course of the common law. The judges cannot make new law by new decisions; they do not assume a power of that kind: they only endeavour to declare what the common law is and has been from the time when it first existed. But inasmuch as new circumstances, and new complications of fact, and even new facts, are constantly arising, the judges are obliged to apply to them what they consider to have been the common law during the whole course of its existence, and therefore they seem to be

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laying down a new law, whereas they are merely applying old principles to a new state of facts. Therefore, with regard to the present case, we have to find out whether there is a principle of the common law, which although it has existed from the beginning, is now to be applied for the first time. I cannot find that there has been a decision of a court of law with reference to such facts as are now before us, that is, with regard to a person acting in the capacity of counsel: but there have been decisions upon analogous facts; and if we can find out what principle was applied in these decisions upon the analogous facts, we must consider how far it governs the case before us.

Actions for libel and slander have always been subject to one principle: defamatory statements, although they may be actionable on ordinary occasions, nevertheless are not actionable libel and slander when they are made upon certain occasions. It is not that these statements are libel or slander subject to a defence, but the principle is that defamatory statements, if they are made on a privileged occasion, from the very moment when they are made, are not libel or slander of which the law takes notice. Many privileged occasions have been recognised. The occasion, with which we now have to deal, is that a defamatory statement has been made either in words or by writing in the course of an inquiry regarding the administration of the law. It is beyond dispute that statements made under these circumstances are privileged as to some persons, and it has been admitted by the plaintiff's counsel that one set of these persons are advocates: it could not be denied that advocates are privileged in respect of at least some defamatory statements made by them in the course of an inquiry as to the administration of the law. It was admitted that so long as an advocate acts bonâ fide and says what is relevant, owing to the privileged occasion defamatory statements made by him do not amount to libel or slander, although they would have been actionable if they had not been made whilst he was discharging his duty as an advocate. But it was contended that an advocate cannot claim the benefit of the privilege unless he acts bonâ fide, that is, for the purpose of doing his duty as an advocate, and unless what he says is relevant. That is the question which we now have to determine. Certain persons can claim

the benefit of the privilege which arises as to everything said or written in the course of an inquiry as to the administration of the law, and without making an exhaustive enumeration I may say that those persons are judges, advocates, parties, and witnesses. There have been decisions with regard to three of these classes, namely, judges, parties, and witnesses, and it has been held that whatever they may have said in the course of an inquiry as to the administration of the law, has been said upon a privileged occasion, and that they are not liable to any action for libel or slander. But it has been suggested that only some of these classes of persons can successfully claim the privilege of the occasion, and those are, judges, parties, and witnesses, who make statements without malice and relevantly; and that those judges, parties, and witnesses, who either speak or write without relevancy and with malice, cannot successfully claim the privilege of the occasion. I am inclined te think that with regard to these classes of persons the law has not always been stated in the same manner by the judges, and some judges have a strong objection to carry the privilege beyond the point to which they are obliged by authority to carry it; they are disinclined to admit the existence of the privilege. Other judges are inclined to carry the privilege to its full extent, and we must see what is the doctrine which has been finally adopted. With regard to witnesses, the chief cases are, *Revis* v. *Smith* (1), and *Henderson* v. *Broomhead* (2), and with regard to witnesses, the general conclusion is that all witnesses speaking with reference to the matter which is before the Court—whether what they say is relevant or irrelevant, whether what they say is malicious or not—are exempt from liability to any action in respect of what they state, whether the statement has been made in words, that is, on vivâ voce examination, or whether it has been made upon affidavit. It was at one time suggested that although witnesses could not be held liable to actions upon the case for defamation, that is, for actions for libel and slander, nevertheless they might be held liable in another and different form of action on the case, namely, an action analogous to an action for malicious prosecution, in which it would be alleged that the statement complained

(1) 18 C. B. 126; 25 L. J. (C.P.) 195. 2 Jur. N.S. 614

(2) 4 H. & N. 569; 8 L. J. (Ex.) 360.

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of was false to the knowledge of the witness, and was made maliciously and without reasonable or probable cause. This view has been supported by high authority; but it seems to me wholly untenable. If an action for libel or slander cannot be maintained, how can such an action as I have mentioned be maintained, it being in truth an action for defamation in an altered form? Every objection and every reason, which can be urged against an action for libel or slander, will equally apply against the suggested form of action. Therefore, to my mind, the best way to deal with the suggested form of action is to dispose of it in the words of Crompton, J., in *Henderson* v. *Broomhead* (1), where he said: "The attempts to obtain redress for defamation having failed, an effort was made in *Revis* v. *Smith* (2) to sustain an action analogous to an action for malicious prosecution. That seems to have been done in despair." Nothing could be more strong, nothing could shew more clearly his entire disbelief in the possibility of supporting that new form of action. The answer to the suggested form of action was that during the hundreds of years which had elapsed such an action never had been sustained. No reported case from the time of the commencement of the common law until the present day can be found in which the suggested form of action has been maintained, and yet it is impossible to suppose that opportunities for bringing actions of that kind and of carrying them to a conclusion have not occurred again and again. However, the question is not as to the form of the action, but whether an action of any kind will lie for defamation uttered in the course of a judicial proceeding. Crompton, J., in *Harrison* v. *Broomhead* (3), also said: "No action will lie for words spoken or written in the course of any judicial proceeding. In spite of all that can be said against it, we find the rule acted upon from the earliest times. The mischief would be immense if the person aggrieved, instead of preferring an indictment for perjury, could turn his complaint into a civil action. By universal assent it appears that in this country no such action lies. Cresswell, J., pointed out in *Revis* v. *Smith* (4) that the inconvenience is much less than it would be if the rule were otherwise. The

(1) 4 H. & N. 569, at p. 579.
(2) 18 C. B. 126; 25 L. J. (C.P.) 195.
(3) 4 H. & N. 569, at p. 579.
(4) 18 C. B. 126.

origin of the rule was the great mischief that would result, if witnesses in courts of justice were not at liberty to speak freely, subject only to the animadversion of the Court." It is there laid down that the reason for the rule with regard to witnesses is public policy. In *Scott* v. *Stansfield* (1) it was held that all judges, inferior as well as superior, are privileged for words spoken in the course of a judicial proceeding, although they are uttered falsely and maliciously and without reasonable or probable cause. The ground of the decision was that the privilege existed for the public benefit: of course it is not for the public benefit that persons should be slandered without having a remedy; but upon striking a balance between convenience and inconvenience, between benefit and mischief to the public, it is thought better that a judge should not be subject to fear for the consequences of anything which he may say in the course of his judicial duty. Therefore the cases of both witnesses and judges fall within the rule as to privileged occasions, notwithstanding it may be proved that any defamatory words spoken by them were uttered from an indirect motive and to gratify their own malice. In *Dawkins* v. *Lord Rokeby* (2) it was assumed for the purposes of the decision, that the defendant had been guilty of both falsehood and malice; nevertheless it was held that no action would lie against him for statements made by him as a witness. The ground of the decision was no doubt that a witness in giving his evidence should not be afraid of being sued for anything that he might say. A similar view of the law was taken in *Seaman* v. *Netherclift* (3); and the same rule has been applied to the parties. If upon the grounds of public policy and free administration of the law the privilege be extended to judges and witnesses, although they speak maliciously and without reasonable or probable cause, is it not for the benefit of the administration of the law that counsel also should have an entirely free mind? Of the three classes—judge, witness, and counsel—it seems to me that a counsel has a special need to have his mind clear from all anxiety. A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider, whether the facts with which he is dealing

(1) Law Rep. 3 Ex. 220. (2) Law Rep. 8 Q. B. 255.
(3) 1 C. P. D. 540; 2 C. P. D. 53.

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are true or false. What he has to do, is to argue as best he can, without degrading himself, in order to maintain the proposition which will carry with it either the protection or the remedy which he desires for his client. If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. For, more than a judge, infinitely more than a witness, he wants protection on the ground of benefit to the public. The rule of law is that what is said in the course of the administration of the law, is privileged; and the reason of that rule covers a counsel even more than a judge or a witness. To my mind it is illogical to argue that the protection of privilege ought not to exist for a counsel, who deliberately and maliciously slanders another person. The reason of the rule is, that a counsel, who is not malicious and who is acting bonâ fide, may not be in danger of having actions brought against him. If the rule of law were otherwise, the most innocent of counsel might be unrighteously harassed with suits, and therefore it is better to make the rule of law so large that an innocent counsel shall never be troubled, although by making it so large counsel are included who have been guilty of malice and misconduct. In *Rex* v. *Skinner* (1), Lord Mansfield, a judge most skilful in enunciating the principles of the law, treated a counsel as standing in the same position as a judge or a witness. In *Dawkins* v. *Lord Rokeby* (2) a most careful judgment was delivered on behalf of all the judges in the Exchequer Chamber, and the opinion of Lord Mansfield was cited and adopted. If the authority of these two cases is to be followed, counsel are equally protected with judges and witnesses. I will refer to *Kennedy* v. *Hilliard* (3), and in that case Pigott, C.B., delivered a most learned judgment, in the course of which he said (4): "I take this to be a rule of law, not founded (as is the protection in other cases of privileged statements) on the absence of malice in the party sued, but founded

(1) Lofft, 55.

(2) Law Rep. 8 Q. B. 255, at pp. 263, 264, 268.

(3) 10 Ir. C. L. Rep. (N.S.) 195.

(4) 10 Ir. C. L. Rep. at p. 209.

on public policy, which requires that a judge, in dealing with the matter before him, a party in preferring or resisting a legal proceeding, and a witness in giving evidence, oral or written, in a court of justice, shall do so with his mind uninfluenced by the fear of an action for defamation or a prosecution for libel." Into the rule thus stated the word "counsel" must be introduced, and the rule may be taken to be the rule of the common law. That rule is founded upon public policy. With regard to counsel, the questions of malice, bona fides, and relevancy, cannot be raised; the only question is, whether what is complained of has been said in the course of the administration of the law. If that be so, the case against a counsel must be stopped at once. No action of any kind, no criminal prosecution, can be maintained against a defendant, when it is established that the words complained of were uttered by him as counsel in the course of a judicial inquiry, that is, an inquiry before any court of justice into any matter concerning the administration of the law.

I am of opinion that the rule of law is such as I have pointed out, that it ought to be applied in the present case, and therefore that this action cannot be maintained.

FRY, L.J. I can, in a very few words, express my concurrence with the judgment which has just been pronounced by the Master of the Rolls, and with the decision of the Court from which this appeal has been brought.

The facts must be taken to be these: an advocate has made a defamatory statement of another person, which is false, and has been made by reason of malice in the advocate, but which has been made by him when speaking as an advocate and with reference to the case which was being heard in the Court. Is such a statement actionable? That I take to be the question for our decision in the present case. If we consider the number of statements made from time to time by advocates affecting the interests and characters of other persons, it is remarkable and, I may add, creditable to the profession, that hitherto no direct decision, either affirmative or negative, has been pronounced upon this point. But although there is no decision, there are dicta of the highest importance, directly bearing on the ques-

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tion. The first is the dictum of Lord Mansfield in *Rex* v. *Skinner* (1), which was uttered by him now more than one hundred years ago: in the course of that case he said this: "neither party, witness, counsel, jury, or judge can be put to answer, civilly or criminally, for words spoken in office. If the words spoken are opprobrious or irrelevant to the case, the Court may take notice of them as a contempt and examine on information. If anything of mala mens is found upon such inquiry, it will be punished suitably." I have read the whole of that passage for the purpose of shewing that Lord Mansfield was dealing with cases in which malice, or mala mens, existed. Then comes the decision to which the Master of the Rolls has already referred, I mean *Dawkins* v. *Lord Rokeby* (2), where in the considered judgment of the Court of Exchequer Chamber occurs the following passage (3): "The authorities are clear, uniform, and conclusive that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law." Later on, after a reference to the authorities, the following passage occurs (4): "But another ground on which this action must fail, and which embraces the great variety of cases in which statements made, whether orally or in writing, are privileged and protected, is that by reason of the occasion on which they are made, the making of them is not such a publication as will support an action for libel or slander. On this ground, whatever is said, however false or injurious to the character or interests of a complainant, by judges upon the bench, whether in the superior courts of law or equity, or in county courts, or sessions of the peace, by counsel at the bar in pleading causes, or by witnesses in giving evidence, or by members of the legislature in either house of parliament, or by ministers of the Crown in advising the Sovereign, is absolutely privileged and cannot be inquired into in an action at law for defamation." The two passages which I have read were perhaps unnecessary to the decision of the case then before the Court; but they are dicta of the highest value, and are in my opinion

(1) Lofft, 55.
(2) Law Rep. 8 Q. B. 255.
(3) Law Rep. 8 Q. B. at p. 263.
(4) Law Rep. 8 Q. B. at p. 268.

nothing less than a declaration of the common law on the point. In addition there are numerous cases which afford a direct analogy to the question which we have to consider in the present case: I refer to those cases, with which the Master of the Rolls has already fully dealt, of witnesses, judges, and parties. With regard to a judge, they establish this proposition—that a judge by speaking or writing a defamatory statement, falsely and maliciously, and without reasonable or probable cause, is not rendered liable to an action, and a similar proposition is established as to witnesses. Why is it that a judge who disgraces his office, and speaks from the bench words of defamation, falsely and maliciously, and without reasonable or probable cause, is not liable to an action? Is not such conduct of the worst description, and does it not produce great injury to the person affected by it? Why should a witness be able to avail himself of his position in the box and to make without fear of civil consequences a false statement, which in many cases is perjured, and which is malicious and affects the character of another? The rule of law exists, not because the conduct of those persons ought not of itself to be actionable, but because if their conduct was actionable, actions would be brought against judges and witnesses in cases in which they had not spoken with malice, in which they had not spoken with falsehood. It is not a desire to prevent actions from being brought in cases where they ought to be maintained that has led to the adoption of the present rule of law; but it is the fear that if the rule were otherwise, numerous actions would be brought against persons who were merely discharging their duty. It must always be borne in mind that it is not intended to protect malicious and untruthful persons, but that it is intended to protect persons acting bonâ fide, who under a different rule would be liable, not perhaps to verdicts and judgments against them, but to the vexation of defending actions. The analogy of these instances is in point, and whether I look at the principles of the common law as declared by the judges, or whether I look to the principle of analogous decisions, it appears to me that this action is not maintainable. Nothing could be more inconvenient than to allow actions of this descrip-

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tion to be brought. A court of justice has control over all proceedings before it: it has very great powers, to which I need not particularly refer, with regard to witnesses, solicitors, and counsel; the Court can always check improper conduct. If such actions were allowed, persons performing their duty would be constantly in fear of actions. Every consideration of convenience is against the action being brought, and in my opinion that is the reason why the present point has not been determined, no action like this having ever been instituted.

I have only one other observation to make, and that is, that the decision at which we have arrived, shews how great an obligation exists on advocates not to abuse their powers. It is a matter for congratulation that those powers have been so well used.

BRETT, M.R. From our judgments it is obvious that we dissent from the opinion of Lord Denman, C.J., expressed by him at Nisi Prius in *Kendillon* v. *Maltby*. (1)

Appeal dismissed.

Solicitor for plaintiff: *W. Brewer.*

Solicitors for defendant: *Palmer & Bull, for Lamb & Evett, Brighton.*

(1) Car. & M. 402; 2 M. & R. 438.

J. E. H.

WEBB *v.* BEAVAN. 1883

May 30.

Defamation—Slander—Words actionable per se—Innuendo—Criminal Offence—Indictable Offence.

Words imputing that the plaintiff has been guilty of a criminal offence will support an action for slander, without special damage; and it is not necessary to allege in the statement of claim that they impute an indictable offence.

DEMURRER to a statement of claim which alleged that the defendant falsely and maliciously spoke and published of the plaintiff the words following: "I will lock you" (meaning the plaintiff) "up in Gloucester Gaol next week. I know enough to put you" (meaning the plaintiff) "there," meaning thereby that the plaintiff had been and was guilty of having committed some criminal offence or offences. The plaintiff claimed 500*l.* damages.

Demurrer, on the ground that the statement of claim did not allege circumstances shewing that the defendant had spoken or published of the plaintiff any actionable language, and that no cause of action was disclosed. Joinder in demurrer.

W. H. Nash, in support of the demurrer, contended that, in order to make the words actionable, the innuendo should have alleged that they imputed an offence for which the plaintiff could have been indicted, and that it was not sufficient to allege that they imputed a criminal offence merely. He referred to Odgers on Libel and Slander, p. 54.

Hammond Chambers, contrà, contended that, according to the earlier authorities, the test, in ascertaining whether words were actionable per se, was whether the offence imputed was punishable corporally or by fine, and that it was not necessary to allege that the words imputed an indictable offence. He cited Com. Dig. tit. Action on the Case for Defamation, D. 5 and 9; *Curtis* v. *Curtis*. (1)

POLLOCK, B. I am of opinion that the demurrer should be overruled. The expression "indictable offence" seems to have

(1) 10 Bing. 477.

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crept into the text-books, but I think the passages in Comyns' Digest are conclusive to shew that words which impute any criminal offence are actionable per se. The distinction seems a natural one, that words imputing that the plaintiff has rendered himself liable to the mere infliction of a fine are not slanderous, but that it is slanderous to say that he has done something for which he can be made to suffer corporally.

LOPES, J. I am of the same opinion. I think it is enough to allege that the words complained of impute a criminal offence. A great number of offences which were dealt with by indictment twenty years ago are now disposed of summarily, but the effect cannot be to alter the law with respect to actions for slander.

Demurrer overruled.

Solicitors for plaintiff: *Doyle & Sons, for Taynton & Sons, Gloucester.*

Solicitor for defendant: *E. Sweeting, for J. M. Clark, Cheltenham.*

W. A.

June 12.

REEVES *v.* BARLOW.

Bill of Sale—Building Agreement—Clause vesting Materials in Landowner—Bills of Sale Act, 1878 (41 *&* 42 *Vict. c.* 31), *s.* 4—*Amendment Act*, 1882 (45 *&* 46 *Vict. c.* 43).

An agreement, by a clause in an ordinary building contract, that all building and other materials brought by the builder upon the land shall become the property of the landowner is not a bill of sale within the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31).

APPEAL from the county court of Tonbridge Wells.

The case was stated in the judgment of the Divisional Court as follows:—

This is an interpleader issue brought to try the right to certain bricks seized by the sheriff of Kent under the following circumstances: Reeves, the plaintiff in the issue, had recovered a judgment against one Addie, a builder, and to levy execution under such judgment had lodged a fi. fa. with the sheriff of Kent,

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who seized a large number of bricks being on lands of Barlow. Barlow thereupon claimed the bricks so seized by virtue of an agreement dated the 1st of January, 1883, and an interpleader issue was ordered in which Reeves, the execution creditor, was plaintiff, and Barlow, the claimant, was defendant. It was proved at the trial before the county court judge that Addie had on the 1st of January, 1883, contracted in writing with Barlow to build upon Barlow's land ninety-five houses.

The contract in question was a building agreement of usual and common form. By clause 1 it was provided that Addie should be at liberty to enter upon Barlow's land for the purpose of making the roads and erecting the messuages stipulated for by the agreement.

2. That plans, elevations, sections, and drawings of the intended houses were to be approved and agreed on.

3. That Addie should build ninety-five houses with the best new and sound materials of every kind, and in accordance with the plans, and specifications, and elevations approved and agreed on.

There were other stipulations as to how the buildings and works were to be carried on, but the same are not material to this case.

By clause 11 it was contracted as follows:—The intended lessee (meaning Addie) shall not remove or excavate any turf, clay, gravel, or soil on the said land until the previous consent in writing of the surveyor, except from off the sites of houses the erection of which shall be about to be immediately commenced, or for the purpose of forming the said roads, and shall not, without such consent first had and obtained, remove from off the said lands for sale or otherwise any timber, turf, clay, gravel, or brick earth, or other materials which may be cut down, taken, or excavated therefrom, and it is also agreed that all building and other materials brought by the intended lessee upon the said land shall, whether affixed to the freehold or not, become the property of the said intended lessor (meaning Barlow).

The bricks seized by the sheriff as above mentioned were brought upon the land of Barlow by Addie for the purpose of carrying out the works contemplated by the building contract aforesaid.

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No lease had been given by Barlow to Addie, and the works were in operation. Barlow claimed the bricks under clause 11 of the building contract. To this it had been answered that the contract amounted to a bill of sale within the meaning of the Bills of Act, 1878, and inasmuch as it had never been registered it was void against the Plaintiff, the execution creditor of Addie. The county court judge held that it was a bill of sale, and this decision was brought up upon appeal. (1)

1883. May 4. The case was first argued before Denman and Hawkins, JJ., who suggested that s. 8 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), requiring the registration of bills of sale within that Act, was repealed by s. 15 of the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), enacting that "the eighth and twentieth sections of the principal Act, and also all other enactments contained in the principal Act which are inconsistent with this Act are repealed . . .;" and yet s. 3 enacted that to bills of sale mentioned in s. 4 of the principal Act "which may be given otherwise than by way of security for the payment of money" the Act of 1882 shall not apply. Doubting, therefore, whether there was any provision rendering such an instrument as that in question void for want of registration the Court directed the case to be re-argued.

May 29. It was re-argued accordingly before Watkin Williams and A. L. Smith, JJ., by

W. English Harrison, for the plaintiff. The question raised on the Act of 1882 has since been decided. That Act does not affect absolute bills of sale. They are still regulated by the Act of 1878: *Swift* v. *Pannell*. (2) Turning therefore to the main point,—in *Brown* v. *Bateman* (3) it was held that such a building contract was not within the Bills of Sale Act, 17 & 18 Vict. c. 36, an assignment, transfer, or other assurance of personal chattels, or "a license to take possession of personal chattels as security for a debt." Bovill, C.J., said, "that this agreement does not operate as a mere license to take possession, in which case possibly it would

(1) By a rule nisi to enter judgment for the defendant.

(2) 48 L. T. (N.S.) 351.

(3) Law Rep. 2 C. P. 272.

have been within the Bills of Sale Act, but that it creates an equitable interest in Holledge," the landowner, "which could not be defeated by the claim of the execution creditor." (1) That case was followed in *Blake* v. *Izard* (2), and approved of by the Court of Appeal in *Ex parte Newitt, In re Garrud* (3), a case on the same Act. But in the Bills of Sale Act, 1878, 41 & 42 Vict. c. 31, s. 4, the interpretation clause, evidently having regard to the language of Bovill, C.J., in *Brown* v. *Bateman* (4), declares that the expression "bill of sale" shall include, inter alia, "any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels or to any charge or security thereon, shall be conferred. If the legislature meant to exclude building agreements, they would have been expressly specified amongst the exceptions in the definition clause. This agreement conferred an equitable right: *Holroyd* v. *Marshall* (5); *Leatham* v. *Amor*. (6) In *Reeve* v. *Whitmore* (7) there was only a power to seize and not an assignment.

If no interest passed, the sheriff could seize. If an equitable interest passed by the deed it needed registration as a bill of sale, otherwise the sheriff could seize.

J. G. Graham, for the defendant. The decision in *Brown* v. *Bateman* (4), was that the document did not need registration, because the transaction between the parties was not such as the Bills of Sale Act was meant to affect. So in *Ex parte Newitt, In re Garrud*. (3) In *Brown* v. *Bateman* (4), the phrase "equitable interest" is used. That is not the same as a "right in equity" within the meaning of the Bills of Sale Act, 1878, s. 4. A power to seize is a "right in equity," but is not an "equitable interest." An "equitable interest" is the greater, and includes a "right in equity," but "a right in equity" does not necessarily include an "equitable interest." The draftsman of the Act must have meant to describe a mere "right in equity," and not "an equitable interest," or he would have used the latter words. But

(1) Law Rep. 2 C. P. 282.
(2) 16 W. R. 108.
(3) 16 Ch. D. 522.
(4) Law Rep. 2 C. P. 272.
(5) 10 H. L. C. 191.
(6) 47 L. J. (Q.B.) 581.
(7) 33 L. J. (Ch.) 63.

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the words "right in equity" were used to meet particular cases. For example, both the Bills of Sale Acts, 1854 and 1878, defined "bill of sale" to include "licenses to take possession of personal chattels as security for any debt." But a right to take possession *not* as security for any debt is an instance of a right in equity not within those Acts. A license to seize future property is another instance. In *Holroyd* v. *Marshall* (1), there was a clear right in equity to seize, but it was not within the Act of 1854. By that Act, 17 & 18 Vict. c. 36, s. 7, the expression bill of sale included "assignments . . . of personal chattels," those words were very comprehensive, yet they were held inapplicable to such a case as the present. Neither is it within the Act of 1878, which was not meant to have a wider general scope, but merely to include such cases as *Reeve* v. *Whitmore*. (2)

Further, under this agreement the full legal interest has passed to the landlord. The goods when brought on to the land belong to him.

Lastly, the repealing sect. 15 of the Act of 1882 is not limited by sect. 3, which is a defining section, confused and ungrammatical, but meaning only that when the words "bill of sale" occur, they shall not refer to any absolute bill of sale, i.e., "given otherwise than by way of security for payment of money."

Cur. adv. vult.

June 12. The judgment of the Court was delivered by

A. L. SMITH, J. (who, after stating the case as above set forth, proceeded:—) It is manifest from the cases of *Brown* v. *Bateman* (3), *Blake* v. *Izard* (4), and *Ex parte Newitt* (5), that the contract in question was not a bill of sale within the meaning of the Bills of Sale Act, 1854 (17 & 18 Vict. c. 36), but it was argued by Mr. English Harrison before us that, notwithstanding those decisions, the contract in question was a bill of sale within the meaning of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31). It was argued that in s. 4 of the Act of 1878 the words "and also any agreement, whether intended or not to be followed by the

(1) 10 H. L. C. 191.
(2) 33 L. J. (Ch.) 63.
(3) Law Rep. 2 C. P. 272.
(4) 16 W. R. 108.
(5) 16 Ch. D. 522.

execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred," were added to what had theretofore constituted the definition of a bill of sale in the Act of 1854, in order to embrace a case like the present which had, before the passing of the Act, been held not to have been a bill of sale, and it was further argued that if the legislature had intended to have exempted building agreements from the Bills of Sale Act, 1878, it would have expressly excepted them, as was done in the cases of assignments for benefit of creditors, marriage settlements, transfers and assignments of ships, and other documents mentioned in s. 4 of the Act. We think that the answer to the last argument is that the exception was made by the statute because otherwise those cases if not excepted would have been within the enacting part of the statute, whereas a building agreement in the present form is not an assignment, transfer, or other assurance of personal chattels so as to come within the enacting portion of the statute, and therefore it has been unnecessary to make any exception in its favour. The real point in our judgment in this case is this—does the clause in the agreement that "all building and other materials brought upon the land shall become the property" of the claimant constitute an agreement by which a right in equity to personal chattels is conferred within the meaning of s. 4 of the Act of 1878? To what chattels, we would ask, is any right given by this agreement? It seems to us no right is given to any. Barlow might have a right to sue Addie for damages if he did not perform his contract, but for what chattels could a suit in equity be brought by Barlow against Addie? It seems to us for none. In our judgment the words in question apply to a case like that of *Ex parte North Western Bank, In re Slee* (1), and to cases of like description, and not to a case like the present. When the materials are in fact brought upon the land the property therein vests in Barlow, and, as above pointed out, this does not constitute an assignment, transfer, or assurance of personal chattels so as to come within the other terms of the Act. We are of opinion that the building contract in question is not a bill of sale within the meaning of the Bills of Sale Act, 1878. As to the point taken, that even if this were a

(1) Law Rep. 15 Eq. 69.

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bill of sale within the Act of 1878, still, by reason of the Bills of Sale Act, 1882, it does not require registration, although unnecessary now for us to decide it, we are of opinion that the point is untenable, and agree entirely with the reasons given by Fry, J., in the case of *Swift* v. *Pannell.* (1)

We are of opinion that the county court judge was wrong, and that this rule must be made absolute to enter a verdict for 2500 bricks.

Rule absolute to enter verdict for defendant accordingly.

Solicitors for plaintiff: *Sole, Turner, & Knight.*
Solicitors for defendant: *Last & Sons.*

J. R.

March 3.

SVENSDEN *v.* WALLACE BROS.

Marine Insurance—General Average—Expenses of warehousing and reshipping Cargo, and of Ship leaving Port of Refuge.

Whether a ship enters a port of refuge in consequence of an injury which is the subject of general average, or in consequence of an injury which is the subject of particular average, the decision in *Atwood* v. *Sellar* (5 Q. B. D. 286) applies, and the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges on the vessel leaving the port, are the subject of general average.

FURTHER CONSIDERATION before Lopes, J.

Action by owners of a Norwegian ship against the owners of her cargo for expenses, claimed as general average expenses, incurred in consequence of the ship having through bad weather sprung a leak, which made it necessary for her to go to a port of refuge, and there unload, warehouse, and reship the cargo.

The expenses in dispute were those of reshipping the cargo at the port of refuge and the port charges, pilotage, and other dues subsequent to the reloading.

C. Russell, Q.C., Cohen, Q.C., and *H. D. Warr*, for the plaintiffs.
Butt, Q.C., and *Myburgh, Q.C.*, for the defendants.

Cur. adv. vult.

(1) 48 L. T. (N.S.) 351.

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March 3. LOPES, J. The amount in dispute in this action is small—88*l.* 19*s.* 10*d.*, the principle involved is important. It is intended, as I understand, not only to raise a point not decided in the case of *Atwood* v. *Sellar* (1), but also to test the propriety of the case of *Atwood* v. *Sellar* (1) decided in the Appeal Court. The distinction between the present case and the case of *Atwood* v. *Sellar* (1) is this. In *Atwood* v. *Sellar* (1) the vessel went into a port of refuge in consequence of an injury which was the subject of general average, in the present case in consequence of an injury which was the subject of particular average. It was determined by the case of *Atwood* v. *Sellar* (1) that when a vessel goes into a port of refuge in consequence of an injury to her which is the subject of general average, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing this injury, and expenses incurred for pilotage and other charges in leaving the port, are the subject of general average. I am bound by the case of *Atwood* v. *Sellar* (1), and if in this case the vessel had gone into a port of refuge in consequence of an injury which was the subject of general average, I mean an act of voluntary sacrifice, I should have been bound to have given the plaintiffs judgment for 88*l.* 19*s.* 10*d.*, for the only distinction between that case and the present is the injury which caused the respective vessels to seek a port of refuge. I have now to determine whether there is any practical difference, so far as the incidence of expenses is concerned, between the case of a ship necessarily seeking a port of refuge in consequence of an injury which is the subject of general average, and a ship necessarily seeking a port of refuge in consequence of an injury which is the subject of particular average. I can see no practical distinction. The putting into a port of refuge, if necessary, is an act of voluntary sacrifice, undertaken for the common benefit of the adventure, ship, cargo, and freight, and I think every expense consequent upon it incurred to enable the ship afterwards to proceed safely on her voyage with her cargo so as to earn the freight, is incurred for the common benefit of the adventure, and is chargeable to general average.

There are expressions in the judgments in *Atwood* v. *Sellar* (1)

(1) 5 Q. B. D. 286.

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by the Court below and the Appeal Court which would seem to cover this point; they are, however, obiter dicta, and were not necessary for the decision of that case.

It seems to me that the point relied on by the defendants, that the expenses of going out of port are not chargeable to general average because the cargo is in safety when the port is reached, is unsustainable. The cargo is in safety when the port is reached, still it must be admitted that the expenses of unloading are general average. Such an argument would be equally cogent whether the cause of putting into port was a general or particular average damage. In *Atwood* v. *Sellar* (1), however, it was held that the expenses of going out of port were general average expenses. I am of opinion the plaintiffs are entitled to judgment for 88*l.* 19*s.* 10*d.*, with interest in the usual way and costs.

I have not thought it necessary to cite authorities. So far as the principle involved in *Atwood* v. *Sellar* (1) is concerned the authorities are most exhaustively dealt with by Thesiger, L.J., in his most able judgment in that case in the Appeal Court. With regard to the other question raised in this case not decided in *Atwood* v. *Sellar* (1) there is little authority to be found.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Field, Roscoe, & Co.*
Solicitors for defendants: *Waltons, Bubb, & Walton.*

(1) 5 Q. B. D. 286.

J. R.

OSBORNE *v.* JACKSON & TODD.

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May 1.

Employers' Liability Act, 1880, 43 & 44 *Vict. c.* 42, *s.* 1—*Negligence whilst in the exercise of Superintendence—Superintendent assisting in Manual Labour.*

An employer may be liable under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1, where personal injury is caused to a workman (sub-s. 2), "by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence," although the superintendent, when negligent, is voluntarily assisting in manual labour.

APPEAL from the County Court held at Shoreditch.

Action under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), for negligence, whereby the plaintiff was injured.

The plaintiff, a bricklayer in the employment of the defendants, was at work near a shoring, while a scaffold was being taken down by their other workmen. Thomas, the defendants' foreman, himself handed a scaffold plank to Collier, a labourer, and called to him to take it. Collier took the end of it, but was so far off that he could not hold the plank, and, the foreman letting his end go, the plank slipped and knocked down the shoring, which fell upon the plaintiff and hurt him.

The foreman, in cross-examination said, "I was acting as superintendent, and went up to assist and see the men did not do any harm to the others. I thought it my duty to do so."

The county court judge found that the foreman was guilty of negligence in parting with the plank before it was safely held by Collier under the circumstances, and that the foreman was acting as superintendent at the time. Verdict and judgment for plaintiff for 50*l.*

A rule was obtained calling on the plaintiff to shew cause why the judgment should not be set aside and judgment entered for the defendants, or why a new trial should not be had, on the ground that the foreman, Thomas, was not guilty of negligence in the exercise of superintendence.

Nasmith, shewed cause. The defendants are liable. The foreman admitted that he was in superintendence of the work, and he

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is found to have been negligent. He was the vice-principal, or representative of his master: see *Murphy* v. *Smith*. (1) Moreover, the foreman told the labourer, Collier, to take hold of the plank, and therefore was "in the exercise of superintendence" within the meaning of 43 & 44 Vict. c. 42, s. 1, sub-s. 2.

Ruegg, in support of the rule. By s. 8, "the expression 'person who has superintendence entrusted to him,' means a person whose sole or principal duty is that of superintendence, and who is not ordinarily engaged in manual labour."

The negligence of Thomas was in doing manual labour, and not in superintendence. He was acting in place of and as a workman only. In *Shaffers* v. *General Steam Navigation Co.* (2) the plaintiff was hurt through the default of a man whose duty it was to give directions to others as to the management of a steam crane, and himself to guide its movements with a guy-rope, which, however, he neglected to use, whereby the injury was caused. He was held not to be a person entrusted with superintendence within the meaning of the Act.

DENMAN, J. The decision in *Shaffers* v. *General Steam Navigation Co.* (2) was on grounds which do not apply here. The negligent person there had two duties, and was not negligent in his duty of superintendence so as to cause the accident. In the present case, the foreman was generally superintending the work on which the plaintiff and Collier were employed. The foreman called to Collier, who was under his orders, to take the plank when it was impossible to do so safely—that was superintendence, and the judge might find, and has found, that it was negligence within the meaning of sub-s. 2. I think it was so, although Thomas was at the time supplying, as a volunteer, the place of another workman.

HAWKINS, J. That Thomas had superintendence intrusted to him is clear from his own admission. His duty was to see that the men did not do harm to the others, and he was guilty of negligence "whilst in the exercise of such superintendence." He took the plank, and, in effect, directed Collier to take it

(1) 19 C. B. (N.S.) 361. (2) 10 Q. B. D. 356.

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when he could not do so safely. The foreman thrust upon Collier a duty which he could not safely perform. If Thomas had directed another to do what he did himself, he would surely have been negligent in the exercise of superintendence.

Rule discharged.

Solicitors for plaintiff: *Thomas Beard & Sons.*
Solicitors for defendants: *Watson, Sons, & Room.*

J. R.

[IN THE COURT OF APPEAL.]

June 29.

KEARSLEY *v.* PHILIPS AND ANOTHER. (1)

Landlord and Tenant—Distress—Mortgage—Attornment by Mortgagor—Seizure of Goods of Stranger.

If a mortgage is created by way of demise for a term of years, and the mortgagor attorns and becomes tenant to the mortgagee at a certain rent, the relation of landlord and tenant is created, and upon failure to pay the rent the mortgagee is entitled to distrain the goods even of a stranger.

J., being lessee for a term of years, demised to P., by way of mortgage, all his interest in the term save one day, and J. attorned and became tenant to P. at a certain rent. J., being mortgagor, let the mortgaged premises to K., who assigned his goods thereon to R. The rent due from J. to P. being unpaid, P. distrained the goods assigned by K. to R. No rent was then due from K.

R. having brought an action against P. for the seizure of the goods:—

Held, that by the attornment J. had become tenant to P., and that the distress was lawful.

THE statement of claim, in substance, alleged that in December, 1881, King was tenant to James Kearsley of certain premises, and that King had in possession on those premises certain goods which he had assigned to the plaintiff, Robert Kearsley, by a bill of sale duly registered and dated the 22nd of November, 1881. On the 2nd of December, 1881, the defendants seized the plaintiff's goods for a distress. At the time when the distress was made, no rent was due from King.

The statement of defence, in substance, alleged that the

(1) This case has been already reported on another point, 10 Q. B. D. 36, 465.

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premises in the statement of claim mentioned were mortgaged to the defendants to secure the sum of 6000*l.* advanced by the defendants to James Kearsley. By an indenture of mortgage dated the 23rd of August, 1875, James Kearsley demised the said premises to the defendants for the residue then unexpired, except the last day, of a term of 993 years, created by an indenture of lease to James Kearsley dated the 31st of January, 1875, and which term commenced from the 29th of September, 1874. By the indenture of mortgage above-mentioned James Kearsley attorned and became tenant to the defendants at the yearly rent of 360*l.* per annum, to be paid by equal half-yearly payments; and it was further provided by the indenture of mortgage that it should be lawful for the mortgagees to determine the tenancy by giving to the mortgagor or his assigns seven days' notice in that behalf. Both before and on the 2nd of December, 1881, James Kearsley was in arrear with his rent to the defendants, and they, by their agents, lawfully distrained the goods and chattels on the demised premises, which were the trespasses complained of.

The reply, after joining issue, alleged, in the alternative, that neither the plaintiff nor King had any notice or knowledge of the indenture of the 23rd of August, 1875, or of the contents or provisions thereof. In the month of November, 1881, James Kearsley was lawfully and in fact in possession of the premises, and in receipt of the rents and profits thereof, and the defendants never in any way interfered with or required the same. King then became tenant of the premises to James Kearsley, at the yearly rent of £435. James Kearsley was not, at the time of the alleged attornment, in occupation or possession of the premises or any part thereof; nor had King or the plaintiff, at any time previous to the commission by the defendant of the acts complained of, any notice of the alleged attornment or tenancy of James Kearsley to the defendants.

Demurrer.

Field, J., gave judgment for the defendants.

The plaintiff appealed.

Ambrose, Q.C., and *Bigham*, for the plaintiff. The question in this case is whether mortgagees, who become landlords simply by

virtue of an attornment-clause, are entitled to distrain the goods of a stranger. In the present case James Kearsley was lessee, and he has not parted with his lease; he has demised the premises to the defendants, the mortgagees, by way of under-lease, for all the term granted to him save one day: the reversion, therefore, is vested in him. James Kearsley, after the mortgage, let the premises to King, who assigned his goods upon the premises to the plaintiff by a registered bill of sale. It may be contended by the defendants that James Kearsley became tenant by virtue of the attornment clause, but it appears from the pleadings that he was not then in possession, and, therefore, the attornment created only a personal right against himself. King came into possession after the mortgage, and his attornment at least was necessary to confer the right to distrain: *Evans* v. *Elliot* (1); but he has not attorned to the defendants. James Kearsley might have distrained if King had not paid his rent: *Trent* v. *Hunt* (2); *Snell* v. *Finch* (3); but no rent was due from King. The plaintiff is an absolute stranger to the mortgagees.

[BRETT, M.R. These decisions do not help us, because in the present case it is suggested that the mortgagor has become tenant to the mortgagees.]

The defendants may rely upon *Anderson* v. *Midland Ry. Co.* (4) and *Morton* v. *Woods* (5); but it is a mere fiction to treat a landlord in equity as a landlord at law; and it is plain, from *Ex parte Punnett, In re Kitchen* (6), that the doctrine contained in *Morton* v. *Woods* (5) is new. It may be asked why a mortgagee should not have all the rights of a landlord; but the answer is that there is in reality no relation of landlord and tenant. The right of distress is a common law right, and it is incident only to an estate at common law. In the present case James Kearsley did not by the attornment become tenant to the defendants at common law; and as no tenancy was created, they had not a legal reversion.

Moreover, James Kearsley was not in possession at the time of

(1) 9 A. & E. 342, at p. 354.
(2) 9 Ex. 14.
(3) 13 C. B. (N.S.) 651.
(4) 3 E. & E. 614; 30 L. J. (Q.B.) 94.
(5) Law Rep. 3 Q. B. 658; 4 Q. B. 293.
(6) 16 Ch. D. 226.

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the attornment; and an attornment by a tenant not in possession may bind the land, but although it is by deed it will not bind persons lawfully in possession.

[FRY, L.J. Under the old law as to attornment it was necessary only for a tenant who held immediately of the grantor to attorn to the grantee, whether or not the tenant had created a lesser estate out of that which he himself held; Litt. Ten. ss. 554, 555; Co. Litt. 311a. This seems to shew that a mortgagor, although he is not in possession, may attorn and become tenant to the mortgagee.]

Smyly, for the defendants, was not called upon to argue: he referred to *Pinhorn* v. *Souster*. (1)

BRETT, M.R. I think that the judgment of Field, J., was right to its full extent. The question to be determined is what are the powers of distress conferred upon a mortgagee by such a deed as that mentioned in the pleadings. For the purposes of our judgment it is necessary to consider what is the relation of mortgagor and mortgagee and also the construction of the clause of attornment. So far as appears from the pleadings in this case, James Kearsley might lawfully create the mortgage which he did create, and the effect of the clause of attornment was to constitute the relation of landlord and tenant. I think that the passage in the note to *Keech* v. *Hall* (2) is correct; it is as follows: "A mortgage deed sometimes contains an agreement that the mortgagor shall be tenant to the mortgagee at a rent; or a power enabling the mortgagee to distrain for interest, by which no tenancy is created. The object of such provisions is generally to further secure the payment of the interest, an object more completely effected by adopting the former than the latter mode of framing the deed; because, whilst the former makes the mortgagor tenant at will only to the mortgagee, so that his interest may be put an end to by demand of possession, and at the same time creates a rent properly so called with all its incident remedies, the latter mode operates merely by way of personal license from the mortgagor, and affects his interest only." When the

(1) 8 Ex. 763.

(2) 1 Sm. L. C. 574, at p. 583 (8th Ed.).

relation of landlord and tenant and a rent, "with all its incident remedies" are created by a mortgage deed, it makes no difference to the rights of the mortgagee that afterwards the premises are let by the mortgagor to an under-tenant. As to the seizure of the plaintiff's goods it has been contended that he is an absolute stranger; but if the relation of landlord and tenant has been created between the mortgagee and mortgagor, it is not, and cannot be, denied that the distress is lawful. The question is whether upon the deed before us the mortgagee has all incident remedies for the recovery of the rent; and to my mind *Morton* v. *Woods* (1) shews that the ordinary relation of landlord and tenant has been created between the parties and that the right of distress exists. *Anderson* v. *Midland Ry. Co.* (2) is a clear authority to the same effect, and it shews that the relation of landlord and tenant exists at common law as well as in equity; and the landlord has the power of distraining even in cases of fraudulent removal. This appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. It appears from the pleadings that James Kearsley mortgaged the premises to the defendants by way of underlease, and that also he attorned and became tenant to them. Being mortgagor, he demised to King, who granted his goods by bill of sale to the plaintiff. The question in this case is whether James Kearsley became tenant to the defendants by virtue of the attornment clause. I think that he did. In *Jolly* v. *Arbuthnot* (3) it was held that a tenancy might be created between a mortgagor and a receiver appointed by the parties to the mortgage, and that the receiver was entitled to distrain and take on the mortgaged premises the goods which had belonged to the mortgagor. In *Morton* v. *Woods* (4) it was held that by an attornment clause the relation of landlord and tenant had been created between second mortgagees and a mortgagor, and that the second mortgagees could lawfully levy a distress, although they had no legal estate, and therefore no legal

(1) Law Rep. 4 Q. B. 293.
(2) 3 E. & E. 614; 30 L. J. (Q.B.) 94.
(3) 4 De G. & J. 224.
(4) Law Rep. 3 Q. B. 658; 4 Q. B. 293.

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reversion. In *Anderson* v. *Midland Ry. Co.* (1) it was held that a tenancy had been created by a mere agreement for a lease, and that the landlord was entitled to distrain in case of a fraudulent removal. In *Pinhorn* v. *Souster* (2) the facts, if they were not identical, were similar to those in the present case, and it was held that the right to distrain existed. The decisive question in these cases is, whether there was a tenancy and not merely a personal contract on the part of the mortgagor.

FRY, L.J. The question as to the effect of an attornment is in truth immaterial; the real point is whether by the so-called attornment clause the defendants re-demised the premises to James Kearsley: I am of opinion that they did. But apart from that point the plaintiff's counsel have failed to satisfy me that in the case of a mere attornment the right to distrain a stranger's goods does not exist.

Appeal dismissed.

Solicitors for plaintiff: *Pritchard & Englefield, for Storer & Lloyd, Manchester.*

Solicitors for defendants: *Johnson & Wetheralls, for Wigglesworth & Rogerson, Manchester.*

(1) 3 E. & E. 614; 30 L. J. (Q. B.) 94. (2) 8 Ex. 763.

J. E. H.

[IN THE COURT OF APPEAL.]

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Aug. 8.

NOTTAGE AND ANOTHER *v.* JACKSON.

Copyright—Photograph—"Author"—Joint Authors—Copyright Act, 1862 (25 & 26 *Vict. c.* 68), *ss.* 1, 4—*Amendment of Pleadings—Costs.*

A. and B. carried on business in copartnership as photographers under the firm of the L. Company. They did not take photographs themselves, but employed managers and a large staff of photographic artists and assistants. One of their managers, thinking that the photograph of the Australian Cricketers would sell well, arranged for the photographs to be taken without any payment being made for taking them, and sent one of the artists in the employ of the firm to take the negative. From this negative the photograph was in the usual way produced and sold by the firm in the ordinary course of business; and A. and B. registered themselves under the Copyright Act, 1862, in their individual names as the proprietors and authors of the photograph. In an action by the firm to restrain the pirating of their copyright in the photograph:—

Held, that A. and B. were not the authors of the photograph.

Semble, that the person who took the negative was the author.

Two or more persons may be registered under the Act as the "authors" of a painting, or a drawing, or a photograph; but in such a case, *quære* whether the copyright would subsist for the joint lives of the authors, and seven years afterwards, or for the lives and life of the survivors and survivor and seven years afterwards.

An amendment to the pleadings made at the trial by the Court, mero motu, in order to raise the real point at issue, is no ground for departing from the usual rule as to the costs of the action.

THE writ in this action claimed an injunction to restrain the defendant from pirating the plaintiffs' copyright photograph of the Australian Cricketers, 1882, and for statutory penalties, and for an account, and for delivery up of all unlawful copies.

The plaintiffs, G. S. Nottage and H. J. Kennard, carried on business in London in co-partnership as photographers under the name and style of the London Stereoscopic and Photographic Company.

They were not themselves photographers, and did not personally conduct their business. They had an establishment in Regent Street and another in Cheapside, and employed managers and a large staff of photographic artists and assistants.

In June, 1882, one of their managers thought that a photograph of the Australian Cricketers then in England would sell well. He accordingly arranged with the captain of the Australian

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Cricketers to take a photograph of the whole team at Kennington Oval, without their paying anything; and, having got an appointment for taking the photograph, he sent one of the photographic artists in the employ of the plaintiffs to the Oval to take the negative, which he accordingly did. The negative was then in due course of business sent to the plaintiffs' works at Barnet, where it was treated in the usual way, and from it the photographs were printed and mounted, and subsequently exhibited for sale in the shops of the plaintiffs.

In July, 1882, the plaintiffs registered the photograph under the Copyright Act, 1882, and in the memorandum entered at Stationers' Hall, in accordance with the provisions of the 4th section of the Act, they described themselves in their individual names both as the proprietors of the copyright and as the authors of the photograph.

On behalf of the defendant it was objected that the plaintiffs were not the proprietors or authors of the photographs.

The action was tried before Field, J., without a jury, and he gave judgment for the defendant with costs on the ground that the plaintiffs were not the authors of the photograph.

The plaintiffs appealed.

July 24. *Petheram, Q.C.*, and *Shortt*, for the appellants. The question turns on the latter part of the 1st section of the Act 25 & 26 Vict. c. 68. That section refers to a customer who orders a photograph of himself to be taken and pays for it. In that case the customer on whose behalf the photograph is made, and not the photographer, is the author. But the section does not apply to a case like the present, where a person carrying on business as a photographer selects the object—whether it be a tree, or a landscape, or a group of cricketers—and sends his own materials and the artists in his employ to take the photograph. In such a case the photographer is the author. It is his idea. Since the Act, all the photographic companies in London have registered themselves under the Act as the authors of the photographs they sell. The case is bare of authority, and to read the section is to state the argument. It is impossible to draw any analogy between a photograph and a picture or a book.

The latter is the creation of the author's mind or brain. You cannot in that sense create a photograph. Photography is a mechanical operation. There is no definition of "author" in the Act, but the "author" of a photograph, in cases similar to the present, is the person who conceives the idea and sends his materials and men to take it, the ultimate result being the manipulation of many hands. Further, copyright is given in the photograph, not in the negative from which the photographs are printed. It is the printed copy which comes before the public in which the right of authorship subsists. Then the "author" must be the person who finds all the materials and is the common employer of all the artists and assistants who carry out the mechanical operations which result in the ultimate production of the printed copy sold to the public.

F. O. Crump, for the respondent. The artist employed by the plaintiff to take the negative is the author. The plaintiffs are not photographers. They only take the profits of the business. It was their manager who arranged that the photograph should be taken, and sent an artist to take it. The artist is the author. The Act contemplates two distinct persons. One, the proprietor, and the other, the author. They may be the same person, or they may be different persons. There was nothing to prevent the plaintiffs from acquiring the copyright from the author.

[COTTON, L.J. Suppose two persons painted between them one picture, who would be the author?]

They would be joint authors, although the Act does not appear to provide for such a case. Having regard to the whole tenor of the Act, it contemplates the taking of the negative as the act of authorship, and that the person who takes the negative, whether he takes it for himself or is employed to take it as the agent or servant of some other person, is the author.

[He was then stopped.]

Petheram, Q.C., in reply.

Cur. adv. vult.

Aug. 8. BRETT, M.R. In this case Messrs. Nottage & Kennard are a firm who carry on business as photographers, under the name of the London Stereoscopic and Photographic Company.

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They, or one of them, directed a person, who is a servant in their employment, but a skilled person, to proceed to a place which is called the Kennington Oval, and there make a photograph of the Australian team of cricketers, which he did, and the photograph was subsequently completed. Then Messrs. Nottage & Kennard, under the name of the London Stereoscopic and Photographic Company, registered that photograph, or the negative of it, under the statute of 25 & 26 Vict. c. 68.

Now they entered themselves as the proprietors of the copyright of the photograph, which was right enough, but they entered themselves also as the "authors" of it; and the question is whether that registration, stating rightly enough that they are the proprietors, but also stating that they were the "authors," is a good registration under the statute of 25 & 26 Vict. c. 68.

I take it to be clear that it can only be a good registration if it was right in them within the meaning of this Act of Parliament to say that they were the *authors* of this photograph. If they were not the authors, the registration is wrong and is void, because the description is void, and therefore this case is to be determined upon our decision as to what is the meaning in this Act of Parliament of the phrase "the author" of a photograph. The words of the Act are "the author being a British subject or resident within the dominions of the Crown, of every original painting, drawing, and photograph, which shall be or shall have been made either in the British dominions or elsewhere, or which shall not have been sold or disposed of before the commencement of this Act, and his assigns"—shall be entitled to a copyright. I need not read the whole of the section; but it is clear that they are bound to state, in the registration, who are the authors. The question is more than what shall be the mere name of the person in the register or certificate; because the copyright, whoever be the proprietor of it, is to continue for the life of the author, and, therefore, if you put in the wrong person as the author, you put in the wrong life, and you may make the duration different from what it should be. I confess I have the greatest difficulty in construing this Act of Parliament. Persons who draw Acts of Parliament will sometimes use phrases that nobody else uses. I am speaking for myself only, as to the strangeness

of the phraseology. It says,—"The author," and so on—"of every original painting." Who ever, in ordinary life, talks of "the *author*" of a painting? We talk of an artist or a painter. Who ever talks of him as in this Act of Parliament as the *author* of a painting? Then it says "the author" of a drawing. Yet one can easily make out who is meant by the author of a painting or a drawing. The author of a painting is the man who paints it; and the author of a drawing is the man who draws it.

But now we have "the author" of a photograph. I should like to know whether the person who drew this Act of Parliament was clear in his mind as to who can be the *author* of a photograph. We understand that all the selling photographers have come to the conclusion that they are the authors of the photographs they sell—that is, the people who pay the servants—that they are the only persons who are interested in the photograph at the time it is done—they think that they are the authors of the photograph because the photograph is made and formed by the work of their mere servants. I cannot tell whether the person who drew this Act of Parliament had that idea or not; but I am not satisfied in my mind that he had, because it is full of difficulties. Here you have merely two gentlemen stated to be the authors. Can two people be the authors of a photograph? It is difficult to say, but, if they are, for whose life is it to last? For the life of one of them, or for the life of the longest liver, or what? They are the owners of everything about their place of business, the machinery and everything else; but they may live in Scotland and their photographic shop may be in London. They may live 200 miles off. Can they be called the authors of a photograph of which they know nothing? It is done by their servants. They may go to the shop once a week; and when they are there they may superintend the operations, though I suppose they very seldom do. At all events, they cannot superintend the making of all the photographs in their shop. They may have half a dozen studios. They may superintend the making of a photograph in one place, and they may have a skilled person who superintends the making of photographs in another place. It would be obvious that they are the authors of a photograph where they are; but are they the authors of a photograph where they are not? Take this very

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case. It is not pretended that these gentlemen were at the Oval; they were either in London or fifty miles perhaps the other side of London. They send a man to the Oval. The idea of photographing the Australian Cricketers no doubt was the idea of one of their managers. The man who went to the Oval was the man who took the photograph. They said, "Go to the Oval and photograph the Australian Cricketers," and he had to do it. Well, he goes to the Oval. What had he to do? He had to arrange the group, to put them in the right position and the right focus. But he does not do it all, because I suppose there is another man who gets the plate ready; and there is another man who, when the thing is ready, takes the cap off. It is difficult to say who is the author of the photograph. Neither of them make the picture because, after all, that is done by the sun. As I say, I wonder whether the gentleman who drew this Act of Parliament was himself clear upon the subject. I do not think he was. I confess I cannot be very clear about it, all I can do is to see who is the nearest person—the nearest like the author of a painting or the author of a drawing. Certainly it is not the man who simply gives the idea of a picture, because the proprietor may say, "Go and draw that lady with a dog at her feet, and in one hand holding a flower." He may have the idea, but still he is not there. He may be 100 miles from the place, and he may have given the instructions by letter. The nearest I can come to is that it is the person who effectively is, as near as he can be, the cause of the picture which is produced—that is, the person who has superintended the arrangement, who has actually formed the picture by putting the people into position, and arranging the place in which the people are to be—the man who is the effective cause of that. Although he may only have done it by standing in the room and giving orders about it, still it is his mind and act, as far as anybody's mind and act are concerned, which is the effective cause of the picture such as it is when it is produced. Therefore it will be a question in every case who that man is. That will be a matter of evidence. That will be a question of fact. We have not to say in this case who was that man. Suppose it was the principal man who was sent down to the Oval. At all events, it was not either of these two

gentlemen who are described as the authors, and it certainly was not both of them. Therefore the "author" here is wrongly described, and the registration is bad, and the copyright does not exist. Consequently the defendant is entitled to judgment, because he is sued for having committed a breach of these gentlemen's alleged rights in their copyright.

After some difficulty, I have come to the conclusion that the judgment of the learned judge in the Court below was right, and must be affirmed, the result being that if this had been properly registered it would not have been for the life of the people to whom alone the thing belonged, but, by reason of the phraseology of this Act of Parliament it would have been for the life of the person whose life probably it was never intended to make the measure of this right. All that the great photographers of London can do seems to me either to superintend the work themselves, or, when they choose their artist to do it, to consider not only his skill but his state of health.

COTTON, L.J. In this case the plaintiffs brought out a photograph of the Australian Cricketers, and they brought an action against the defendant on the ground that he had been publishing the same photograph, and they claim the copyright under the Act of 25 & 26 Vict. c. 68. Now the Act provides that no action shall be brought until there has been a registration in compliance with the terms of the 4th section, and it requires, amongst other things, that the author shall be stated in a memorandum which is registered. That is essential, because the duration of the copyright depends upon the life of the author, and it is, therefore, most important that the real author should be stated in the memorandum which is registered.

The objection taken by the defendant in this case, which was held good in the Court below, was this—that the plaintiffs had registered themselves in their names of George Swan Nottage and Howard John Kennard as the authors of this photograph. They carry on business under the name of the London Stereoscopic and Photographic Company, and it is undoubted that, if they are the authors, and if there is copyright in somebody, they are the proprietors of that copyright.

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The Act gives no definition of "author," and the Act, as regards photographs, is not very accurately drawn. It sometimes talks of a photograph and sometimes of a negative. It says, the author "shall have the sole and exclusive right of copying, engraving, reproducing and multiplying such painting or drawing and the design thereof or such photograph and the negative thereof." Both of them are photographs; but I think it is pretty clear that the owner of the copyright is to have the sole right of multiplying in any way the prints from the negative.

As the Act does not give any definition of what an author is, we must consider what an author is, as regards what we have here —photographs. As regards other matters which are here referred to—paintings and drawings—it appears to me there is no difficulty; because although "author," I agree, is not a word very aptly applied to a painting or a drawing, yet one understands what it means. It is not the person who suggests the idea, but the person who makes the painting or drawing, who is the author. Of course a good deal may be done by the hand of those who work under his direction, but he must be the originator in the making of the painting or drawing. When one comes to a photograph, it is said there is a difference as regards the production of a photograph from what there is as regards paintings and drawings. Undoubtedly there is a very great difference in the way in which a photograph is produced. That is to say, the actual painting, if I may say so, is done by the sun, but it is done by the sun by means of the various appliances used so as to produce the picture. Then is there in the nature of a photograph any essential difference? The mere preparing the materials, or preparing and supplying of the instruments—the lens and the camera—by means of which the sun is made to act on the plate, cannot, in my opinion, make a man the author any more than preparing the canvas, or the paper, or the pigments, or the colour, can make the man who prepares them in any sense the author of a painting or drawing. If there were an essential difference as regards a photograph as distinguished from a drawing—that is to say, if it were evident that no person could be the author of a photograph in the same way that a person is the author of a painting—we might possibly be compelled to give a different

meaning to the word "author" as regards photographs than we do to pictures, but that is not so. It is not necessary that photography should be carried on by persons who act as the servants of others, who pay them, and who provide the materials and give directions as to what is to be done. Nor is it necessary that the different processes of preparing the plate or paper, of taking and developing the negative, and of printing from it, should be done by several persons. Some do all these processes. There is nothing in the nature of the thing to make us give a different interpretation to the word "author" in the case of a photograph to that which we should give to it in the case of an author of a painting or drawing. In my opinion, "author" involves originating, making, producing, as the inventive or master mind, the thing which is to be protected, whether it be a drawing, or a painting, or a photograph.

Now, have the plaintiffs here done anything of the kind? In each case it must be a question of fact. All they do, as I understand, is this. They are the proprietors of a large photographic shop. They provide, undoubtedly, materials, and they pay the people who are actually employed to take the photograph, whether of men or of landscapes, or of anything else: but they were not the persons who gave directions to the person to go and take the photograph. It was simply one of their foremen, who had the idea that a photograph of the Australian Cricketers would be one which would take with the public, who directed the actual operator, as I will call him, to go and take the photograph at the Kennington Oval. So that they did not give the direction or make the suggestion; but, even that, in my opinion, would not do. They did nothing whatever as regards the production of this work, except that they paid for the materials; they paid for the machinery, and they paid the salary of the actual operator who took this photograph. It is unnecessary to decide here who is the author of a photograph when several persons are engaged in the different processes. It is sufficient to say in this case that the plaintiffs, though undoubtedly carrying on their business in a way to satisfy the public, are not the authors of this photograph in which they seek to have a

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copyright. Therefore, in my opinion, the decision of the Court below was right, and this appeal fails.

BOWEN, L.J. I am of the same opinion. In this case Messrs. Nottage & Kennard have entered themselves on the register as the authors of a photograph of the Australian team of Cricketers, which was taken by an artist whom they sent down for the purpose to the Oval.

The question is whether they are authors within the meaning of s. 1 of the Copyright Act of 1862.

Now there is no definition of "author" given in the Act, nor is the term "author" a legal term. It is purely a popular and conventional one. Who is the author of a painting, a picture, or a photograph? Although it may be true that in each case there is sufficient difference between the questions to render it impossible to say that one is to be determined exactly as the other, still in all three cases the question must be one of fact. Who is the author here of this picture of the Australian team of Cricketers? Who would be the author supposing Messrs. Nottage & Kennard had never been born and that the artists who were employed by them went down upon their own business and on their own pecuniary resources to take this picture? Of course the authors would be the artists who took the picture. Do they become less the authors because they were employed by Messrs. Nottage & Kennard?

It is to be remarked that this Act of Parliament treats photography as a fine art. It puts it on a level, for the purpose of registration, with paintings and drawings. In order to see who is the author of a photograph one must consider the question on the assumption that photography is to be treated, for the purpose of the Act, as such fine art. I think it is evidently not the man who pays—not the man who contributes the machinery—not the man who does nothing except form the idea—not the man who does nothing towards embodying the idea—not the man who finances the expedition, or who sends it out—none of those persons, in the ordinary sense of the term, can be considered the artist. Let us suppose for a moment that, instead of being an

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expedition to the Oval to take the cricket team, it had been an expedition to photograph some phenomena which might occur in the transit of Venus. Could the British Government, supposing they sent out the people on board ship to take the photograph of the transit of Venus, in any sense be considered the authors of the photograph? The only difference between that kind of question and the question we have to decide in the present case is one of degree. There is not a much greater interval or distinction, as regards genius, between the author of a picture and the author of a signboard, than there is between a photographer who takes a picture of the transit of Venus and a photographer who take a photograph of a man or a horse. They are both authors in a sense. I should say the true definition of "author" for the purpose of the Act—keeping in mind all that has been said as to painting, and that photography is to be treated, for the purpose of the Act, as an art—was the man who really represents or creates, or gives effect to the idea or fancy, or imagination—the man, in fact, who, in the words of the Master of the Rolls, is most nearly the effective cause of the representation when completed. That cannot be Messrs. Nottage & Kennard, who, sitting in the distance, simply contribute the machinery and the funds, nature finding the sun, whilst the person who has the machinery uses them for the purpose of embodying the idea. I think the meaning of the 1st section of the Act must be what I suggest, for this additional reason. The copyright given in the photograph is only to enure during the natural life of the author. In the first place, the section does not say "during the natural life of the author or authors." I do not mean to say you must not construe the section as if it did, and that if there had been two authors, and one of them survived the other, the copyright would not perhaps last during the life of the survivor; but I do say that the person who drew this section evidently thought that in ninety-nine cases out of a hundred there would be only one author. The idea of there being two authors seems never to have presented itself to him; which shews that he took rather the notion I have formed in common with the rest of the Court as to the definition of the term; and, secondly, there is this cogent argument: the copyright is to enure during the "natural life"

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of the author. If the author is the person who finances, a joint stock company, limited, may be the author. What is the natural life of a joint stock company, limited? There is no such thing. That appears to me to shew that whoever drew this section did not contemplate an author being a corporate body, nor did he imagine, apparently, the case of an author being more than one person. I think that is a very strong additional argument in favour of the decision at which the Court below arrived.

Shortt submitted that no costs of the appeal should be given. The point on which the case had been decided was not raised on the pleadings, but had been added by amendment by the judge in the Court below in order to raise the real point at issue.

BRETT, M.R. There seems no reason to take this case out of the ordinary rule that the costs should follow the event.

Appeal dismissed.

Solicitors for appellants: *Neish & Howell.*

Solicitors for respondent: *Smith & Wilmer, for Eddison & Eddison, Leeds.*

M. W.

July 16.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* LAWRENCE AND OTHERS, JUSTICES OF THE PEACE OF THE CITY OF LIVERPOOL.

Licensing Acts—Ale House—License for Sale of Excisable Liquors—Neglect of Occupier about to Remove to apply for Renewal—Expiration of Licence—Application to Special Sessions—9 Geo. IV., c. 61, s. 14.

S., tenant of a house and licensed to sell excisable liquors therein, made over the house in June, 1881, to W., who forthwith sub-let it to B. B. applied at a special sessions for a transfer of the licence, which was opposed by S., and refused. At the time of the general licensing meeting B. was in occupation, but was about to leave owing to illness in her family, and did not apply for a renewal of the licence. She left shortly afterwards and the house was shut up, and no excisable liquors had been sold there since June. In September, after the close of the licensing meeting, the landlord learnt that the house was vacant and took possession. The licence expired on the 10th of October. The landlord afterwards let to D., who, in January, 1882, applied to a special sessions for a renewal of the licence:—

Held, that B. as occupier, though not holding a licence, was a person entitled

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to apply at the general sessions for a renewal of the licence, and that the event mentioned in 9 Geo. IV., c. 61, s. 14, of the occupier of a house being about to quit the same neglecting to apply at the general meeting for a licence to continue to sell excisable liquors therein, had occurred, so that an application under that section could be made:

Held, also, overruling *Ex parte Todd* (3 Q. B. D. 407), and *White* v. *Justices of Coquetdale* (7 Q. B. D. 238), that it was not necessary that the application should be made before the expiration of the period for which the old licence was in force, and that the justices in special sessions had jurisdiction to grant the application.

THE Prince of Wales Hotel, Highfield Street, Liverpool, was, at the time of the general annual licensing meeting in 1881, a licensed public-house, and no notice of objection to the renewal of the licences was given before or during that meeting. Street had become tenant in January, 1881, and at a special sessions held in that month the licences had been transferred to him. While he was tenant the mortgagees of the landlord gave him notice to pay the rent to them. In June, 1881, Street gave up possession under some arrangement with a person named Wood, who re-let to a Mrs. Barker, who entered into possession. The house was not open for the sale of excisable liquors, nor were such liquors sold there, nor was any licensed person in occupation after June, 1881. Mrs. Barker applied at a special sessions held before the general annual licensing meeting in 1881 for a transfer of the licences from Street to herself. Street opposed, and the application was refused. At the time of the general annual licensing meeting Mrs. Barker was occupier, but about that time scarlet fever broke out in the house and Mrs. Barker left the premises and never returned. The premises were disinfected and then closed until the mortgagees took possession. Mrs. Barker did not apply at the general annual licensing meeting, or at any adjournment thereof, for a renewal of the licences to the premises, and no application for a renewal of the licences was then made by anyone, and the licences expired on the 10th day of October, 1881, by effluxion of time.

The mortgagees were not aware until the 21st of September, 1881, after the close of the general licensing meeting for that year, that Mrs. Barker had left, that the premises were closed, or that there had been an omission to apply at the general meeting

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for a renewal of the licences. On learning these facts they at once took possession, and on the 24th of November, 1881, at a special sessions, one Robert Wren applied under 9 Geo. IV., c. 61, s. 14, for a grant of a licence to him. This was refused. On the 5th of January, 1882, Davis became possessed of the premises under an arrangement with the mortgagees for the purchase of the freehold, and on the same day applied to the justices at the transfer sessions for a grant of a licence to him under the above section. The justices refused the application on the ground of want of jurisdiction. Davis appealed to the quarter sessions, and on the 18th of April, 1882, the decision of the justices at the transfer sessions was reversed, subject to a case to be stated for the opinion of the Queen's Bench Division. A case was accordingly stated of which the above is an abridgment.

On the 3rd of April, 1883, a Divisional Court (Denman, Field, and Hawkins, JJ.), quashed the order of the quarter sessions, giving no formal judgment, but saying that the case was concluded by the authorities, which will be found in the argument.

Davis appealed, and the appeal was heard on the 16th of July.

Sir F. Herschell, S.G., and *Bremner*, for the appellant. The question turns upon 9 Geo. 4, c. 61, s. 14. The case comes strictly within the words "if the occupier of any such house being about to quit the same shall have wilfully omitted or shall have neglected to apply at the general annual licensing meeting." The decision appealed from goes on the ground that where the existing licence has expired, a special sessions has no power to grant a licence in any of the cases specified in the section, and that, therefore, on the 10th of October, 1881, it had become incompetent to a special sessions to comply with the application. In the present case, and such is usually the case, there were no special sessions between the general licensing meeting and the 10th of October, so that the decision makes the provision nugatory in the ordinary run of cases. If there had been a special sessions before the 10th of October, and an application had then been made, the licence then granted would only have lasted till the 10th of October, so it would have been of no use. The section contains no words limiting its application to the case where the

licence has not expired. Now as to the cases relied on, the first is *Simpkin* v. *Justices of Birmingham.* (1) In that case the person who gave up possession had lost his licence before he removed. He therefore did not come within the terms "if any person so licensed shall remove." In *Ex parte Todd* (2) it is laid down generally that an application under s. 14 must be made before the licence has expired, but the circumstances of the case did not require such a rule. F., who was licensed, gave up possession to B. before the general meeting. B. applied for a transfer to himself, and the application was refused. B. gave up his tenancy and was succeeded by G., who after the licence had expired gave up his tenancy and was succeeded by T., who applied for a renewal. It was not a case of an occupier about to quit omitting to apply for a licence; the case does not fall within this branch of the section.

[BOWEN, L.J. Is there any difference in principle between the two branches of the section?]

Yes; it would be a hardship on a landlord if a tenant, being about to quit, could spite him by not applying for a renewal, and so render the premises unlicensed. In that case if the premises were to continue to be used as an inn a new licence must be applied for, and that is a very different matter from applying for a renewal of the old one, a renewal being almost of course, but the grant of a new licence a matter of discretion. The language of the branches of the clause is very different. One speaks of a "person so licensed" removing; the clause now in question refers to an occupier omitting to apply, not saying anything about his being a holder of a licence at the time. The judges in *Ex parte Todd* (2) considered themselves to be following *Simpkin's Case* (1), but they did not observe that the decision there turned on the meaning of "person so licensed," which words do not occur in the branch under consideration. If the occupier had applied at the general licensing sessions he would have got a renewed licence for a year, down to October, 1882; and so if the justices at the special sessions in January, 1882, granted a licence it would continue to that time. The third case

(1) Law Rep. 7 Q. B. 482. (2) 3 Q. B. D. 407.

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is *White* v. *Justices of Coquetdale.* (1) This case followed the rule laid down in *Ex parte Todd* (2), which the judges treated as extending the doctrine of *Simpkin* v. *Justices of Birmingham.* (3) The latter case is rightly decided, but the rule laid down in *Todd's Case* (2) is not according to the Act. If it is right the house must remain unlicensed till the next following general licensing sessions, in August or September.

[BRETT, M.R. I suppose the same result would happen in such a case as *Simpkin* v. *Justices of Birmingham.* (3)]

Yes; it is one of the risks that a landlord must run that the licence may be lost by reason of the tenant being an improper person to have a licence. The case might be a hard one, but there was no getting over the fact that the tenant when he removed was not a "person so licensed."

[COTTON, L.J. If *Ex parte Todd* (2) is right I do not see how sect. 14 is to be worked.]

It could not be worked. The general licensing sessions, according to the Act, must be in August or September. If the adjournment of them is to September, as it was in this case, the default could not be ascertained till then, and the section requires six weeks' notice to be given. But suppose a special sessions to be held before the 10th of October, and suppose the notice should be given in time, all that the applicant could get would be a licence till the 10th of October, and then the house must be shut up till the general licensing sessions in the next year.

[BRETT, M.R. Do you say that the decision in *Ex parte Todd* (2) was wrong on the facts?]

It may possibly be right on the ground that the assign must be an assign of a person having a licence, and when the licence expires he may be held to cease to answer that description.

[BRETT, M.R. What is the meaning of the observation of Cockburn, C.J. (4), that the hardship to the landlord arose from two things, the second being that he did not himself apply before the expiration of the old licence?]

The remark arose from a pure misconception. Nobody but the

(1) 7 Q. B. D. 238.
(2) 3 Q. B. D. 407.
(3) Law Rep. 7 Q. B. 482.
(4) 3 Q. B. D. 416.

occupier can apply. The point is going to be made that Mrs. Barker was not a person who could have applied; but she clearly could. She was the occupier, and it is no objection that the licence had not been transferred from Street to her. The renewed licence is granted to the occupier, not to the person who previously had the licence. By 9 Geo. 4, c. 61, s. 4, the justices are to appoint special sessions, not more than eight nor fewer than four. The reason is that changes of tenancy frequently occur during the year, for which it is necessary to provide. The most common case is that of a change of tenancy by arrangement, and then a transfer is obtained under sect. 11. But changes of tenancy may take place in other ways than by arrangement between outgoing and incoming tenants, and the object of s. 14 was to provide for such cases. It was intended to protect the landlord against the risk of the occupier's neglecting to apply for renewal, by putting him in the same position as if the tenant had done his duty and applied for renewal. The words of the provision, if rightly construed, effect this purpose.

Aspinall, Q.C., and *Pickford*, contrà. The section does not apply, for there has not been any omission or neglect by any person who had power to make the application. Street had left the property months before the licensing meeting, and no neglect or omission can be alleged against him. Mrs. Barker does not answer the conditions of the Act, which speaks of the case where an occupier has neglected or omitted to apply for a licence "to *continue to sell* excisable liquors." Mrs. Barker never had any licence to sell liquors, and therefore, could not apply for a licence to continue to sell them. She could only have applied for an original licence. The omission intended by the Act is an omission by a licensed tenant who is also occupier, and at the time of the licensing sessions is about to quit the house. Street was not occupier. Mrs. Barker was not a licensed person, so neither of them could be guilty of the default or omission mentioned in the Act. An application might have been made within the year on the ground of Street's removal. Instead of that the licence is allowed to expire, and then an application is made for renewal on the ground of neglect or omission by a person who had no power to apply.

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As to the grounds taken by the other side, the construction adopted in the Queen's Bench cases no doubt limits the operation of the section, but does not make the section wholly useless, for it at all events enables the occupier to get a licence till October.

[BRETT, M.R. Your difficulty is of this kind. Suppose a tenant is to go out in November. He omits to apply for renewal. The new tenant cannot apply because he is not occupier. So the property must remain without a licence till the general licensing session in the following year.]

That no doubt is a difficulty, but on the other hand, if the contrary construction be adopted, there seems to be no limit as to the time within which the application must be made. There is nothing in the section to shew that it was intended for the protection of landlords. It must be supposed to have been intended for the convenience of the public who want a licensed public-house. The 14th sect. applies to five cases: death, incapacity from sickness, bankruptcy, removal, and neglect or omission to apply for a renewal. The clause contemplates, as regards the fifth case, a person going on selling up to the 10th of October under the licence, and neglecting to apply for a renewal. That is not this case. The present circumstances bring the case under the fourth head, and both *Simpkin* v. *Justices of Birmingham* (1), and *Ex parte Todd* (2), decide that in case of removal, the application must be made before the expiration of the licence, and the decision in *Ex parte Todd* (2) was not wrong upon the facts. The argument from inconvenience has force as regards the fifth case, but none as regards the fourth. The fourth head contains the words "person so licensed," the fifth does not.

Sir F. Herschell, S.G., in reply. Mrs. Barker being occupier could have applied for a licence, and it would have been a renewed licence, as appears from the definitions of "A new licence," and "The renewal of a licence," in 35 & 36 Vict. c. 94, s. 74. The argument on the other side involves this—that the sessions are to grant not a licence but a transfer of a licence, for it is only a licence lasting as long as the original licence.

BRETT, M.R. In this case it seems to me that Mrs. Barker, on the facts stated, was a person who could have made an application

(1) Law Rep. 7 Q. B. 482. (2) 3 Q. B. D. 407.

for a renewal of the licence. According to the definition which has been read to us by the Solicitor-General, if she had obtained a licence it would not have been a new licence but a renewed licence for the premises. At the time of the general annual licensing meeting Mrs. Barker was the occupier of the house and premises, and from unhappy circumstances in her family she was at that time a person who was about to quit the premises. Being at that time a person in the occupation of the premises, it seems to me that she was entitled to ask for a renewal of the licence. She did not apply for the renewal. Then, after the 10th of October, on which day the licence which had been granted for these premises expired, the appellant applied to the magistrates to exercise the jurisdiction given to them by 9 Geo. 4, c. 61, s. 14, and the question is whether they had jurisdiction. The question is not whether they were obliged to grant the renewal; they were prepared to do it if they had jurisdiction. Now if Mrs. Barker was a person who, if she had obtained a licence at all, would have obtained a renewed licence, then it seems to me that she was an occupier of a house, who, being about to quit the same, neglected to apply "at the general annual licensing meeting for a licence to continue to sell exciseable liquors to be drunk or consumed in such house." That is, I construe the words "to apply for a licence to continue to sell excisable liquors" to be equivalent to "apply for the renewal of a licence." I do not construe them to mean that the person who is to ask for a licence having previously sold, is to continue to sell, but that a licence shall be granted which shall enable him to continue the sale which has previously been carried on upon those premises. In my opinion, therefore, Mrs. Barker was a person who might have applied for a renewal and who did not do so.

The case then having been brought within the terms of s. 14, the whole question is whether an efflux of time has happened which prevented the magistrates from having jurisdiction. In *Ex parte Todd* (1) it was certainly held that the magistrates have no jurisdiction after the licence which has been in existence has become exhausted. The case of *White* v. *Justices of Coquetdale* (2) obviously was decided in obedience to the case of *Ex parte*

(1) 3 Q. B. D. 407. (2) 7 Q. B. D. 238.

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Todd (1), and the question, therefore, is clearly raised before us whether we agree with *Ex parte Todd.* (1) The present case seems to me to be exactly governed by the principles there laid down, and by the construction of the Act there enunciated, and unless we can say that we do not agree with the construction put upon the section in that case, we are bound to decide against the appellant. But I confess that I do not agree with that construction. It is admitted that there are no words which specifically put this limitation of time on the power of the justices; therefore we ought not to say that there is such a limitation unless it is necessarily to be implied. Now so far from there being such necessary implication, it seems to me the restriction put upon the section in *Ex parte Todd* (1) raises a most formidable difficulty, viz., that where a licensed person in the occupation of premises of which he is to give up possession after the 10th of October, omits to apply at the general licensing meeting in August or September for a renewal of the licence, then the licence must be lost. There is no other person who can apply, for the application must be by the occupier. The new tenant who is coming in in November or at any time after the 10th of October cannot apply, the licence is exhausted on the 10th of October, and if the construction put upon the section in *Ex parte Todd* (1) be true, there is no remedy, and the premises must remain without a licence until the following 10th of October. That would be a casus omissus of such a formidable kind that instead of saying that there is a necessary implication of a restriction of time, one would feel inclined to say that it was almost a necessary implication that the restriction of time was not intended. I think that this view of the section was overlooked in *Ex parte Todd.* (1) I do not think that the authority of that case is strengthened by *White* v. *Justices of Coquetdale* (2), because the judges there did not exercise their minds upon the section, but only followed the former decision, as they were bound to do. I think that the magistrates in this case were bound also to act upon *Ex parte Todd* (1), but the case having now been discussed before us, we are at liberty to say that we disagree with that decision. It seems to me that the present case is within the

(1) 3 Q. B. D. 407. (2) 7 Q. B. D. 238.

section, that there is no limitation of time which deprived the justices of their jurisdiction, and that they therefore had jurisdiction to admit the appellant to a renewed licence. We do not in the least interfere with *Simpkin* v. *Justices of Birmingham* (1), for the decision there was not that there was any limitation of time, but that the circumstances were not such as to bring the case within the section at all.

COTTON, L.J. There are two points which we have to consider. First, whether an event had occurred which enabled the magistrates to act under the 14th section, and then whether there is any limit as to time, which, in the events which have occurred, prevented them from exercising their jurisdiction. The Master of the Rolls has said almost all I had intended to say upon *Simpkin* v. *Justices of Birmingham*. (1) The question there was whether facts or circumstances had occurred giving the magistrates jurisdiction, and the case does not bear upon the present. All it decided was that where the tenant who had the licence did not remove until after his licence had expired, he was not a person "so licensed" removing, for that, on the construction of that part of the section, the person removing must be a person licensed at the time that he removed. But what we have to consider is whether there is any limit as to the time during which the jurisdiction continues. In the present case I do not say that the removal of the licensed tenant Street, during the existence of the licence, was not an event which might be relied upon; but the event which has been relied upon is the neglect of Mrs. Barker to apply for a renewal, and I think that her neglect was an event which justified the present applicant in applying to the justices. It is another question whether the time within which they could exercise the jurisdiction is limited, and whether such limited time has expired. I agree with the Master of the Rolls that Mrs. Barker was in a position to apply for a licence to "continue to sell excisable liquors" in the house, that is, to continue the use of the house as a house where liquors might be sold, and that as she neglected to do so an event occurred which justified an application to the magistrates.

(1) Law Rep. 7 Q. B. 482.

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Then as regards the limit. Could the justices grant a renewed licence at a special sessions held after the previous licence had expired? In my opinion there is nothing to prevent their doing so. All that is said in the Act is that if the event happens "it shall be lawful for the justices assembled as aforesaid at a special session to grant a licence." No limit whatever is there expressed, and it is very difficult to see how if the occupant neglects to apply for a renewal at the general annual licensing meeting, or at the adjournment, there can be an application under the section before the expiration of the licence. In all parts of the country, except Middlesex and Surrey, the licences expire on the 10th of October, and the general annual licensing meeting and the adjourned meeting must be in August or September. Therefore it seems to me that it would be impossible practically to work the section, as regards the neglect of the occupier to apply for the renewed licence, if the application must of necessity be made at a special session held during the continuance of the licence. Under the Act there need not be more than four special sessions in the year, and it is obvious that there generally would be no special sessions at which the application could be made before the 10th of October, after the neglect of the occupier to apply in September. That being so, I think that we ought to give to the words of the section their natural construction, and not import into it a limitation of the time within which the jurisdiction can be exercised. Undoubtedly that is at variance with *Ex parte Todd* (1), but we are in a position to say whether that case was rightly decided, and in my opinion it cannot be supported on the ground that the jurisdiction of the magistrate could not be exercised after the licence had expired.

BOWEN, L.J. I am of the same opinion. There are here two questions which we have to decide. First, whether Mrs. Barker is a person who falls within the description given in the 14th section of a person "who neglects or wilfully omits to apply for a licence to continue to sell." With regard to that point my opinion is the same as that of the Master of the Rolls and Cotton, L.J., although I confess that I do not feel so clear as they do about it.

(1) 3 Q. B. D. 407.

But I should like to add a few words about the second point, i.e., whether, assuming Mrs. Barker to answer the description, the application was made too late? That depends upon whether *Ex parte Todd* (1) is good law or not. However we may distinguish *Ex parte Todd* (1), and endeavour to justify it as a correct decision upon the special facts of that case, it still remains clear that the Court, with their minds clearly brought to the discussion of the question, laid down distinctly that an application under s. 14 must be within the period during which the old licence is in force. Now is that good law? With the greatest respect for the Court that decided it, I cannot think that it is. One objection which to my mind is almost conclusive against it is this, that so to construe the section is reading into it words which limit its primâ facie operation and make it do something different from and smaller than what its terms express. Now certainly we should not readily acquiesce in a non-natural construction which limits the operation of the section so as to make the remedy given by it not commensurate with the mischief which it was intended to cure. In this case we have to deal with the licensing system. It hangs upon two kinds of licensing sessions. First there is the general licensing sessions, to which applications are made to renew for one year, to begin on the 10th of October. Then, as changes must occur in the tenure of these houses, special sessions are wanted to provide during the year for changes which occur in the tenancy. It is obvious that provision must be made for contingencies, such as death, changes of occupancy, bankruptcy, &c., and s. 14 is intended to deal with these. The branch of that section under which the present case falls provides that "if the occupier of any such house being about to quit the same wilfully omits or neglects to apply to the general annual licensing meeting," then the jurisdiction given by the section is to arise, a jurisdiction no doubt intended to enable the justices to remedy the mischief. Now what is the protection which the landlord would gain and the benefit which the occupier would obtain if the occupier applied to the annual licensing meeting? The landlord would gain the protection, and the occupant would gain the benefit of a licence to run from the 10th of October

(1) 3 Q. B. D. 407.

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then next for a year. But if we construe the section as the Court in *Ex parte Todd* (1) construed it, the provision which the section makes for an omission to apply for the licence at the general annual licensing meeting would not be commensurate with the protection and benefit which would have been obtained if the application had been duly made. That is to say, the section would not cure the slip or blunder completely, but only to a very limited and almost imperceptible extent, because, as has been pointed out, where an occupier of a house has omitted to apply to the general annual licensing meeting, it must be rare indeed for the next occupier to have any opportunity of applying for a renewal during the pendency or currency of the old licence. It seems to me, upon the general principles of construction, this is a very good reason for not construing the section in that way. The Courts sometimes do violence to the language of an Act of Parliament in order to cure a mischief, but certainly they ought not to do violence to the language or to read it in an unnatural sense when the effect of so reading it would be to leave the mischief uncured, or to a great extent uncured.

Solicitors for appellant: *Gregory, Rowcliffes, & Co.*
Solicitor for respondents: *Venn.*

(1) 3 Q. B. D. 407.

H. C. J.

[IN THE COURT OF APPEAL.]

1883
Aug. 1.

YOUNG *v.* SCHULER.

Guarantee—Signature by Agent both for Principal and in his own Right—Parol Evidence.

By articles of agreement under seal between J. A. & Co. and Y. & Co., Y. & Co. agreed to do certain work for which J. A. & Co. were to make certain payments, and the agreement contained this clause, "It is further understood between the parties to this contract that J. O. Schuler guarantees payment to Y. & Co. of all moneys due to them under this contract." The attestation clause was "signed and delivered by the said J. A. & Co. in the presence of C. T.," and Schuler, acting under a power of attorney, signed as follows: "P.P.A.—J. A. & Co., J. O. Schuler." Y. & Co. sued Schuler as guarantor, and evidence was given at the trial of statements by Schuler at the time of execution that he intended to sign on his own behalf as well as on that of A. & Co. A verdict was found for the plaintiffs. Schuler moved for a new trial on the ground that he had not signed the guarantee:—

Held, affirming the decision of the Queen's Bench Division, that evidence that Schuler intended to sign in his own right as well as on behalf of A. & Co. did not contradict the document, and was admissible, and that Schuler must be taken to have signed as a contracting party.

By articles of agreement under seal dated the 15th of November, 1876, expressed to be made between John Abrahams & Co. of the one part, and Henry Young & Co. of the other part, reciting a previous agreement by Young & Co. with Abrahams & Co. to prepare ready for shipment an iron, wood, and glass building, to be used for an exhibition at Cape Town, South Africa, for 3500*l.*, it was agreed between the parties to the present contract that in consideration of Abrahams & Co. paying Young & Co. 1723*l.* the latter firm would fix at Cape Town the materials comprised in the previous contract, and do other things mentioned in the agreement for the completion of the building. It was further agreed between the parties to the contract that in consideration of a bill of exchange drawn by Young & Co. and accepted by J. Otto Schuler being handed to Young & Co. for their own use, Young & Co. made over to Abrahams & Co. certain plant sent out from England for erecting the building. Abrahams & Co. agreed that cash should be advanced by their agent at Cape Town at the rate of 75*l.* per cent. fortnightly as the work pro-

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ceeded, and that the remaining 25*l.* per cent. should be paid when the work was completed. After some further stipulations, which need not be noticed, came the following clause: "It is further understood between the parties to this contract that the aforesaid J. Otto Schuler guarantees payment to the said H. Young & Co. of all moneys due to them under this contract." After some further stipulations relative to the conduct of the works came this clause, "Now it is distinctly understood between all parties to this contract that the aforesaid J. Otto Schuler guarantees the payment of all moneys due to H. Young & Co. under this contract only on condition that the said H. Young & Co. well and truly perform all the terms and conditions of this contract." Then, after a provision for reference to arbitration, the agreement concluded with "In witness whereof the said H. Young & Co. and the said John Abrahams & Co. have hereunto set their hands and seals the day and year first above written."

"Signed and delivered by the said H. Young & Co., in the presence of } Henry Young & Co."

"Charles Till.

"Signed and delivered by the said John Abrahams & Co., in the presence of } P.P.A. John Abrahams & Co., J. Otto Schuler."

"Charles Till,

"12, Gardner Road,

"Hampstead."

Schuler executed the instrument in the name and on behalf of J. Abrahams & Co. under a power of attorney from them, and the above signature "P.P.A. John Abrahams & Co., J. Otto Schuler," was in Schuler's handwriting.

Abrahams & Co. having failed to pay Young & Co. the moneys due under the contract, Young & Co. sued Schuler as guarantor. Schuler, by his statement of defence, denied having guaranteed the payment of any sum to the plaintiffs.

At the trial evidence was given of statements by Schuler at the time of the execution of the agreement clearly shewing that

he intended to sign on his own behalf as well as on that of Abrahams & Co. The jury found for the plaintiffs, and gave a verdict for 994*l.*

July 12. *E. Clarke, Q.C.*, moved for a new trial, on the ground that the damages were excessive, and that on the face of the agreement Schuler had not signed on his own behalf, and that evidence was not admissible to shew that he had.

GROVE, J. On the point of reduction of damages we are agreed that there ought to be a rule nisi for a new trial unless the plaintiffs consent to a verdict for 609*l.* instead of 994*l.*

Upon the next point I cannot say that I am absolutely without doubt; but I think the balance decidedly against the defendant. In the clause relating to the guarantee, Schuler is expressly named, the other parties are referred to, and there can be no doubt who they are—Abrahams & Co., and Young & Co. The agreement is signed by Young & Co., and "P.P.A. John Abrahams & Co., J. Otto Schuler." Schuler signs "John Abrahams & Co." and then signs his own name in addition. Under these circumstances, in the absence of evidence, I should say that Schuler signed both for Abrahams & Co. and for himself. It must be assumed that he read the contract before he signed it. It is admitted that if he had signed his own name twice it would be first for Abrahams & Co., and secondly, for himself. Now, would any man of business go through the ceremony of signing his name twice, because one object of the document he signs is to make him a guarantor?

Then there is evidence of contemporaneous statements of Schuler, which, if admissible, makes it clear that Schuler intended to be bound. I think that evidence admissible. There being ambiguity in the contract as to the capacity in which Schuler signed, evidence as to what he said at the time as to the capacity is admissible. I think the jury were right in their finding. The only thing which made me doubt was the peculiar wording of the clause: "It is understood between the parties to this contract, &c." It may be that this expresses nothing but an understanding between Abrahams & Co. and Young & Co., that Schuler would guarantee; but as Schuler saw that this was

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intended, and signed his name to the document containing it, I think it must be held that he signed in order to make himself liable.

MANISTY, J. I agree that there was a sufficient note or memorandum signed by Schuler within the Statute of Frauds, 29 Car. 2, c. 3, s. 4. The statute provides that no action shall be brought to charge the defendant on any promise to answer for the debt of another person, "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." The question then is, first, was there a contract, and, secondly, was there a note in writing sufficient to satisfy the statute. Assuming the evidence to be admissible, which I think that it is, it clearly shews that Schuler intended to bind himself, and he must be taken to have signed with that intention.

Aug. 1. *E. Clarke, Q.C.*, renewed his application for a rule nisi before the Court of Appeal.

It was put to the jury whether Schuler intended to bind himself. On the face of the document he did not, and evidence was not admissible to shew that he did, for it contradicts the document.

[COTTON, L.J. Suppose A. enters into a contract with B. that S. will guarantee a debt, and S. says, "I assent to A.'s entering into this contract for me," would not that be sufficient to bind S. Does not Schuler's signing prove such assent?]

No; for he does not sign in his own right, but only as the attorney of Abrahams & Co.. The agreement is purely an agreement between Young & Co. and Abrahams & Co., and Schuler signs only for Abrahams & Co., as is manifest by the form of the execution and attestation.

BRETT, M.R. If there is here a signature by Schuler as a contracting party, then an effectual guarantee has been given by him. The question then simply is, did he sign as a contracting party? Looking at the document alone this is doubtful, and if there were no evidence on the subject I should say that Schuler signed only for Abrahams & Co. But the questions whether a person

has signed his name at the foot of a document, and if so, for what purpose, are questions of evidence, and any evidence on the subject which does not contradict the document is admissible. Here is a signature by Schuler, which may, as it seems to me, without contradicting the document, be taken as a double signature; a signature on his own behalf and also as agent for Abrahams & Co. Evidence then is given of such admissions made by him at the time as plainly shew that he intended it to be a double signature. This evidence does not contradict anything on the face of the document, and is, in my opinion, clearly admissible. The application, therefore, must be refused.

COTTON, L.J. I am of the same opinion. A verdict has been found against the appellant as having signed a guarantee. The contract is between the plaintiffs and Abrahams & Co.; but it contains what purports to be a guarantee by Schuler. Schuler signs the contract "P.P.A. John Abrahams & Co., J. O. Schuler," and there is evidence that he signed with the intention of binding himself. Primâ facie he would be taken to have signed only for Abrahams & Co.; but evidence that he intended to sign in both capacities, in his own right and as attorney for Abrahams & Co., does not contradict the document, and is admissible. I am of opinion, therefore, that he must be taken to have signed in both capacities.

BOWEN, L.J. I am of the same opinion.

Rule refused.

Solicitors for defendant: *Lewis & Lewis.*

H. C. J.

1883
May 11.

[IN THE COURT OF APPEAL.]

THE QUEEN, ON THE PROSECUTION OF THE COMMISSIONERS OF THE TREASURY *v.* THE JUSTICES OF MIDDLESEX.

Prison—Governor—Superannuation—Compensation—Allowance—Superannuation Act, 1859 (22 *Vict. c.* 26), *s.* 7—*Prison Act*, 1877 (40 & 41 *Vict. c.* 21), *s.* 36.

At the time of passing the Prison Act, 1877, C. was the governor of a prison, which, pursuant to that statute, was transferred to the Secretary of State for the Home Department. The justices of M. had been the local authority having the control of the prison. C. retired from his appointment soon after the coming into force of that Act, and the Commissioners of the Treasury awarded to C. an annuity of 582*l.* 13*s.* 4*d.*, and apportioned it as follows: 429*l.* 6*s.* 8*d.* to be borne by the justices of M., and 133*l.* 6*s.* 8*d.* to be borne by grants provided by Parliament. At the time of his retirement C. was less than sixty years of age, and he had not become incapable from sickness, age, or infirmity, or injury, of executing his office in person, and he retired for the purpose of facilitating improvements in the management of the prison. The justices having declined to pay the sum of 429*l.* 6*s.* 8*d.* :—

Held, by Brett, M.R., and Lindley, L.J., Bowen, L.J., doubting, that the Commissioners had jurisdiction to apportion the annuity granted to C. in the manner above-mentioned, and that a mandamus would lie to compel the justices of M. to pay the amount apportioned upon them.

A RULE was obtained calling upon the justices for Middlesex to shew cause why a writ of mandamus should not issue commanding them to pay to T. H. Colvill the sum of 429*l.* 6*s.* 8*d.*, being the proportion of the pension awarded to him as the late governor of the Middlesex House of Correction, which the justices were liable to pay to the said T. H. Colvill on his being retired.

Afterwards a special case was stated for the opinion of the Court by consent of all parties under Order LXII., rule 3, of the Rules of the Supreme Court, and pursuant to a rule of Court. The material portions were as follows:—

1. Previously to and up to the 1st day of April, 1878 (the date of the coming into operation of the Prison Act, 1877), the justices for the county of Middlesex in quarter sessions assembled were the prison authority in respect of Coldbath Fields Prison, in the county of Middlesex, a prison belonging to that county, and were

the local authority having before that date the management and control of the prison and its officers.

2. On the 7th of December, 1854, the justices appointed Colonel T. H. Colvill governor of Coldbath Fields Prison under the provisions of 4 Geo. 4, c. 64, s. 25, and 2 & 3 Vict. c. 56, s. 24, and the other public general Acts then in force. Colonel Colvill continued to act as governor of the above prison beyond the 1st of April, 1878, namely, until the 24th of August, 1878, as hereinafter mentioned.

3. After the coming into operation of the Prison Act, 1877, the prison, together with all the officers thereof, was taken over by and became subject to the control of the Secretary of State for the Home Department and the Prison Commissioners, according to their respective functions, as by that Act is provided. Colonel Colvill continued subsequently to the transfer to be the governor, and to discharge the duties of governor down to the 24th of August, 1878. But he ceased to be governor as from the 1st of August, 1878, under the circumstances hereinafter appearing.

4. Shortly after the coming into operation of the Prison Act, 1877, namely, in June, 1878, Colonel Colvill was informed by one of the Prison Commissioners that he might if he pleased resign his appointment of governor at once and receive the full rate of pension, and he told the Prison Commissioners that he was willing to retire on a pension of two-thirds of his salary and emoluments, and he wrote a letter to that effect to the Prison Commissioners. Another gentleman was shortly after this communication appointed governor of the prison by the commissioners, and from that time Colonel Colvill was unable to act as governor of the prison. He was, after he was so unable to act, informed by one of the Prison Commissioners that his pension was fixed at 582*l.* 13*s.* 4*d.* per annum, but he had no official notice of that fact or of his resignation being accepted.

5. The Secretary of State, after the transfer of the prison mentioned in paragraph 3, caused particulars of Colonel Colvill's services, accompanied by a letter, dated the 15th of May, 1878, to be forwarded to the Commissioners of the Treasury, in order that they might be moved to award to him such an amount of compensation allowance as they might consider adequate to meet the

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circumstances of the case, and in order that payment of the allowance might be apportioned between the funds to be provided by Parliament and the rates, which at or immediately before the commencement of the Prison Act, 1877, were applicable to the payment of the salary of Colonel Colvill. The Commissioners of the Treasury thereupon awarded to Colonel Colvill an annuity of 582*l.* 13*s.* 4*d.* per annum, commencing from the 1st of August, 1878, and apportioned it as requested, namely, 429*l.* 6*s.* 8*d.*, to be borne by the justices of Middlesex as the prison authorities of Coldbath Fields Prison, and 153*l.* 6*s.* 8*d.* to be borne by grants provided by Parliament.

6. From the documents contained in the appendix to the special case it appeared that Colonel Colvill had served as governor of the prison upwards of twenty-three years, and that his pension (582*l.* 13*s.* 4*d.*) represented $\frac{3\,8}{6\,0}$ths ($\frac{1}{6\,0}$th per annum) for a service of twenty-three years, with $\frac{1\,0}{6\,0}$ths (ten years) added on his retirement from the public service for the purpose of facilitating improvements in the organisation of the department to which he belonged, and $\frac{5}{6\,0}$ths (five years) added under s. 4 of the Superannuation Act, 1859, the pension being calculated on a salary and emoluments reckoned at 920*l.* per annum.

7. Colonel Colvill at the time of his retirement was less than sixty years of age, and he had not become incapable from confirmed sickness, age, or infirmity, or injury received in actual execution of his duty, of executing his office in person, nor had a medical certificate of any such age, infirmity, or injury ever been made or given.

8. The office held by Colonel Colvill had not been abolished, nor had he been deprived of any salary or emolument by reason of the abolition of the office which he held. By reason, however, of his ceasing to be governor as aforesaid, he ceased to enjoy the salary and emoluments which as governor he had enjoyed.

9. Col. Colvill retired from his governorship for the purpose of facilitating changes in the general system of administration of all the prisons vested in the Secretary of State by the Prison Act, 1877, and the improvements in the organization of the prison department which were then in the course of being carried out for the purpose of economy and efficiency. This re-organisation

applied generally to the whole prison department, including the prisons which were retained as prisons, a number being discontinued.

11. No special minute within the meaning of s. 7 of the Superannuation Act, 1859, had ever been made or laid before Parliament with reference to Col. Colvill or his office.

12. Col. Colvill's only right to a pension or allowance before the passing of the Prison Act, 1877, depended on public general statutes.

13. No grant or award had been made by the Treasury of any pension or superannuation allowance to Col. Colvill, other than as above-mentioned. The defendants declined to pay to Colonel Colvill the portion of the allowance demanded from them, and on the 18th of November, 1879, a formal demand to pay the same was addressed to the defendants through their clerk, by the Solicitor to the Treasury. The defendants subsequently to the receipt of such demand assembled in quarter sessions, and on the 16th of February, 1880, the defendants, through their clerk, refused to pay the same.

The question for the opinion of the Court was whether the defendants ought to discharge out of the county rates the portion of the annuity so charged upon them as aforesaid or any part thereof.

The Queen's Bench Division (Field and Stephen, JJ.) were of opinion that the defendants were liable to discharge out of the county rates the whole of the portion of the annuity charged upon them, and made the rule for a mandamus, absolute.

The defendants appealed.

April 7, 9. *R. S. Wright*, for the defendants. The first clause of the Prison Act, 1877, s. 36 (1), refers to superannuation allow-

(1) By the Superannuation Act, 1859 (22 Vict. c. 26), s. 7, "it shall be lawful for the Commissioners of the Treasury to grant to any person retiring or removed from the public service in consequence of the abolition of his office, or for the purpose of facilitating improvements in the organization of the department to which he belongs, by which greater efficiency and economy can be effected, such special annual allowance by way of compensation as on a full consideration of the circumstances of the case may seem to the said commissioners to be a reasonable and just compensation for the loss of office; and if the compensation shall exceed the amount to which such person would have been entitled under the scale of superannuation provided by

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ances or gratuities in respect of length of service; and the second clause refers to "compensation allowance" for displacement from this Act, if ten years were added to the number of years which he may have actually served, such allowance shall be granted by special minute, stating the special grounds for granting such allowance, which minute shall be laid before Parliament, and no such allowance shall exceed two-thirds of the salary and emoluments of the office."

By the Prison Act, 1877 (40 & 41 Vict. c. 21), s. 36: "If at any time after the commencement of this Act it appears to the Treasury that any existing officer of a prison has been in the prison service for not less than twenty years, and is not less than sixty years of age, or that any existing officer of a prison has become incapable, from confirmed sickness, age, or infirmity, or injury received in actual execution of his duty, of executing his office in person, and such sickness, age, infirmity, or injury is certified by a medical certificate, and there shall be a report of the Prison Commissioners testifying to his good conduct during his period of service under them, and recommending a grant to be made to him, the Treasury may grant to such officer, having regard to his length of prison service, an annuity, by way of superannuation allowance, not exceeding two-thirds of his salary and emoluments, or a gratuity not exceeding the amount of his salary and emoluments for one year.

"If any office in any prison to which this Act applies is abolished or any officer is retired or removed, any existing officer of a prison who by reason of such abolition, retirement, or removal is deprived of any salary or emoluments, shall be dealt with in manner provided by the Superannuation Act, 1859, with respect to a person retiring or removed from the public service in consequence of the abolition of his office, or for the purpose of facilitating improvements in the organization of the department to which he belongs.

"'Prison service,' for the purposes of this section, means, as respects the period before the commencement of this Act, service in a particular prison, or in the prisons of the same authority, transferred to the Secretary of State, and as respects the period after the commencement of this Act, service in any such prison or in any other prison transferred to the Secretary of State under this Act.

"Any annuity by way of superannuation allowance or gratuity granted under this section shall be apportioned between the period of service before the commencement of this Act, and the period of service after the commencement of this Act; and so much of such annuity or allowance as is payable in respect of service before the commencement of this Act, regard being had to the amount of salary then paid, but without taking into account any number of years added to the officer's service on account of abolition of office or for facilitating the organization of the department, shall be paid by the prison authority of the prison in which the officer, to whom such annuity or allowance is granted, was serving at the date of the commencement of this Act out of rates, which at or immediately before the commencement of this Act were applicable to the payment of the salary of such officer, and the residue shall be paid out of moneys provided by Parliament."

office; the superannuation allowance is partly chargeable on the justices in proportion to the length of service; the other, the compensation allowance for removal from office for public purposes, is not chargeable on the county at all; in this case the pension was not superannuation allowance, and could not be, because Col. Colvill had not fulfilled all the requisite conditions. There is a further point, that Col. Colvill was not, in fact, "retired" or "removed" compulsorily. There is no difference between retirement and removal. An option was offered, which he accepted; he might have continued to be governor. Even if the Commissioners of the Treasury could lawfully grant him a pension, they could not make the justices of Middlesex pay part of it out of the rates.

Colonel Colvill did not come within the first clause of the Prison Act, 1877, s. 36, he was not sixty years of age, and was capable of executing the duties of his office. If the Prison Act, 1877, had not passed, the justices of Middlesex would not have granted Colonel Colvill a pension, he not being incapacitated; and there is no suggestion of any kind of hardship. The second clause of s. 36 of the Prison Act, 1877, refers to allowance upon retirement; and in the Superannuation Act, 1859, s. 7, that kind of compensation is called compensation allowance. Throughout the whole series of Acts "superannuation" and "compensation" are distinguished from each other as regards their character and incidents. It is contended for the justices, that the words "any annuity by way of superannuation allowance or gratuity," is confined to superannuation allowances and gratuities properly so called, and do not extend to grants of "compensation" allowance for abolition of office or removal for improvement of prisons: these "compensation allowances" are to be paid by the Treasury. Colonel Colvill was appointed governor when 5 & 6 Vict. c. 98, s. 30, was in force. By the Prison Act, 1865 (28 & 29 Vict. c. 126), s. 15, the local prison authorities were authorized to grant superannuation to officers of not less than twenty years' standing, and of more than sixty years of age, or to officers incapacitated for service. Sect. 73 repealed the 5 & 6 Vict. c. 98, s. 30, but ss. 74, 79, contain saving clauses. The Prison Act, 1877, transferred all the prisons from the local authorities to the Secretary of State,

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and made the prison officers public servants. By sect. 35 their status is defined, and s. 36 deals with superannuation and compensation. The Treasury has given Colonel Colvill something in the nature of a superannuation allowance, which it had no power to do, he being less than sixty years of age, and capable of discharging the duties of his post. He is entitled to no superannuation, although the Treasury might grant him some allowance for his removal from office. It may be admitted that the second clause of s. 36 has been properly complied with. But the broad distinction between "compensation" and "superannuation" is kept up in other statutes, such as the Prison (Officers' Superannuation) Act, 1878 (41 & 42 Vict.), c. 63, the Pensions Commutation Act, 1871 (34 & 35 Vict. c. 36), and the Pensions Commutation Act, 1872 (35 & 36 Vict. c. 83), and the Pensions Commutation Act, 1876 (39 & 40 Vict. c. 73). The words in the last clause of the Prison Act, 1877, s. 36, "without taking into account any number of years added to the officers' service on account of abolition of office or of facilitating the organization of the department," were intended to apply to the case of officers who are over sixty years of age, but do not wish to retire. Moreover, there was no jurisdiction to add five years' service under the Superannuation Act, 1859, s. 4.

A. L. Smith (*Sir H. James, A.G.*, with him), for the prosecutors. The Commissioners of the Treasury had jurisdiction to grant the annuity to Colonel Colvill: it is not a special annual allowance, but it is composed partly of superannuation allowance for the office of governor, and partly of a gratuity in addition. The last clause of the Prison Act, 1877, s. 36, means what it says: if the contention for the defendants is right, the enactment does not provide the mode of payment of an officer who is retired or is removed. Every annuity granted under this enactment must be by way of superannuation allowance.

R. S. Wright, in reply. It is true that the Prison Act, 1877, s. 36, does not contain any provision as to the mode of payment of compensation; but that is provided for by the Superannuation Act, 1859, which assumes that the funds must be provided by Parliament.

Cur. adv. vult.

May 11. The following judgments were delivered:—

LINDLEY, L.J. This is an appeal from the Queen's Bench Division, and as the question which we have to decide arises upon a special case stated for the opinion of the Court, it will be necessary for me only to mention shortly what is the point which we have taken time to consider.

Before the passing of the Prison Act, 1877, the Coldbath Fields Prison was under the control of the justices of Middlesex and the governor of the prison was Colonel Colvill. After the Prison Act, 1877, had passed, Colonel Colvill retired under the circumstances which I will state presently, and an allowance, or pension, or compensation was awarded to him by the Treasury amounting to the sum of 582*l.* per annum. The Treasury apportioned that sum in this way: 429*l.* was to be borne by the justices of Middlesex representing the ratepayers, and 153*l.* by the Government. The justices considered that this was an unauthorized act, and that the Treasury had no power to direct that sum of 429*l.* to be paid out of the rates, and this is the question between the Treasury and the justices as raised by the special case.

The facts relating to Colonel Colvill will be found in paragraphs 7, 8, 9 of the special case. Upon these facts I must consider what is the operation of the statutes cited. The first Act to which I will refer is the Prison Act, 1877, which is the principal Act. I may say at once that I have felt great difficulty as to the interpretation of the section to which I am about to refer. Up to a certain point the section is plain and intelligible, but the introduction into it of certain words by way of parenthesis has made the real meaning extremely obscure. The section cannot be construed alone; it must be construed with regard to the provisions in another Act of Parliament, commonly called the Superannuation Act, 1859 (22 Vict. c. 26), and that again has to be construed with reference to previous Acts, and more particularly to 4 & 5 Wm. 4, c. 24. There is a series of Acts relating to allowances, superannuation, compensations, and pensions of various kinds, and I think that it can be established by a minute examination of that series of Acts, that there has been, of late at all events, a tendency to class these various pensions into different

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divisions and sub-classes, and to entitle them by different names. For example, a distinction is drawn between superannuation, allowance, and compensation, and that distinction has to be borne in mind. In 4 & 5 Wm. 4, c. 24, which is the governing Act of the series, we find many words used to denote pensions of various sorts. We have the word "compensation," which applies to offices abolished or reduced in value; we have the words "pension," "allowance," "superannuation," "superannuation allowance or compensation," and "retired allowance." These words are used to denote the various classes of pensions or allowances. Upon studying 4 & 5 Wm. 4, c. 24, alone, as far as I can make out, the three words "compensation," "superannuation," and "allowance," seem to denote different things, the word "allowance" being applied mainly to unusual superannuation allowances. The importance of these observations is to let it be seen that I have endeavoured to ascertain and appreciate the distinction between the various words, namely, "superannuation," "allowance," and "compensation." Bearing that in mind, I now come to the Prison Act, 1877, s. 36. Colonel Colvill does not come within the first clause of that Act: he was not sixty years of age, and had not become incapable from sickness, age, infirmity, or injury, of executing his office in person: the first clause is applicable to an annuity, by way of superannuation allowance, that is, a retiring allowance, to be granted in the cases specified in the clause. The second clause, however, does apply to this case. It has been contended, although not very strenuously, that Colonel Colvill does not fall within it, because he was not "retired." But I am of opinion that that contention cannot prevail, and that Colonel Colvill is in the position of an officer of a prison who was "retired." He was allowed to retire, and that circumstance comes within the language of the second clause, and the expression "is retired" does not refer exclusively to a compulsory retirement. This second clause of the Prison Act, 1877, s. 36, throws us back to the Superannuation Act, 1859, for it says in substance the officers of prisons therein mentioned shall be dealt with in the manner provided by that Act. If the Prison Act, 1877, s. 36, had stopped there, the substance of the enactment would be this: that the officer of a prison, such as

Colonel Colvill, would be entitled to be paid by the Treasury out of the public funds, and not out of the rates, such a sum as the Treasury might award him under the provisions of the Superannuation Act, 1859, to which I will now proceed to refer. Sect. 2 relates to the ordinary rate of superannuation allowance, and it is sufficient to observe that the rate of superannuation allowance is there made to depend upon the period of service, there being various scales according to the period of service, whether ten years, twelve years, or more. Then in s. 4 is a provision for computing the amount of superannuation to persons holding professional and other special offices, and I refer to that section simply for the purpose of shewing the scheme upon which the Act is based. The scheme is that when an additional allowance is to be made under the enactment, a certain number of years is to be added, and the officer receiving the pension is to be treated as having served more years than he actually has served, and the scale applicable to the period of service for that larger number of years is then to be put in force. Then comes s. 7, which is an important enactment in this case, and would have governed this case if the Prison Act, 1877, s. 36, had stopped at the end of the second clause. The first half of s. 7 of the Superannuation Act, 1859, seems to shew that, in theory at all events, the Treasury could grant to a person whose case falls within it such a sum by way of compensation as they might think right, without having regard to any scale; they might take a general view of the matter and grant a lump sum. But although that is theoretically possible, in my opinion the last part of the section shews that it was not contemplated that the Treasury would act in an arbitrary manner, and I think that the second clause of s. 7 of the Superannuation Act, 1859, shews that what was contemplated was that the Treasury in granting compensation would have regard to the period of service which the officer had already served, and would apply to that period, not rigidly possibly, but as a standard, the scale referred to in s. 2; so that although it may be theoretically possible for the Treasury to make an arbitrary grant without regard to any scale, yet that method of proceeding was not contemplated by the Legislature. I think that it would not be right for us to assume that the Treasury would take an arbitrary view of their

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powers, and would exercise them arbitrarily in any case, and we ought to attribute to them the intention in granting compensation of proceeding upon the lines sketched out by the Act of Parliament. I make that observation for the purpose of the next enactment to which I have to refer, which is the last clause of s. 36 of the Prison Act, 1877. Pausing for the moment at the point at which I have arrived, I repeat that if s. 36 of the Prison Act, 1877, had stopped at the end of the second clause, Colonel Colvill would be entitled to be paid by the Treasury and not by the ratepayers, such compensation by way of allowance as the Treasury might think fit to grant to him under s. 7 of the Superannuation Act, 1859. The whole difficulty in this case arises from the introduction into the last clause of s. 36 of the Prison Act, 1877, of the words, "but without taking into account any number of years added to the officer's service on account of abolition of office, or for facilitating the organisation of the department." These words are not applicable at all to the case of an officer who is simply entitled to a superannuation allowance under the first clause of the section; those words can apply only to the case of an officer who is entitled beyond that to compensation, as distinguished from superannuation allowance; and, therefore, we are driven into this difficulty, that in order to give effect to the words which I have mentioned we must extend the meaning of "superannuation allowance or gratuity" and hold them to include compensation, or we must deprive those words of the effect which it was intended that they should have, and defeat the purpose for which they were introduced into the Act. It is a difficulty arising out of the language used by the Legislature, and we must grapple with it as best we can. I quite feel the difficulty that we cannot by any method interpret these words with strict accuracy, and without stretching some and restricting others; it is impossible to avoid doing some violence. It has been suggested that these words have been inserted to meet a case of the following description:—suppose that the governor of a prison has served his full time, and is over sixty years of age, but does not wish to retire, being in good health, although if he liked to retire he would be entitled to superannuation allowance under the first clause of the section, and suppose that neverthe-

less the prison authority representing the Government, considers it desirable for the purpose of facilitating the re-organisation of his office, that he should retire, or be removed, and be compensated. I am by no means prepared to say that these words would not include such a case as that, but the question which we have now to consider is whether they are confined to that case, and I cannot say that I see any reason for so confining them. It appears to me that the true explanation of this extremely obscure section is that by a blunder in drafting the section, the expression "superannuation allowance" in the early part of the last clause has been used in a technical sense as excluding compensation, but in the last clause has been inserted upon the supposition that "compensation" has been included in "superannuation allowance," otherwise I cannot understand the section. It appears to me that the only real difficulty in construing it is that the words which I have mentioned would cease to be applicable, if the Treasury were to adopt an arbitrary method of compensating the officer under s. 7 of the Superannuation Act, 1859; but I think that we must assume that the Treasury will act as it was intended by the Legislature that it should act, namely, that in granting compensation they will base their calculation upon past services; and in that case the difficulty is got over. It appears to me, therefore, that notwithstanding the extreme obscurity of the Prison Act, 1877, s. 36, the judgment of the Queen's Bench Division was right, and that this appeal ought to be dismissed.

Brett, M.R., desires me to say that he concurs in my view.

BOWEN, L.J. Like the other members of the Court I have bestowed much time and reflection upon the construction of this difficult and obscure enactment, the Prison Act, 1877, s. 36. In my opinion a conclusion in favour of either the appellants or the respondents cannot be arrived at without doing considerable violence to the language of both that statute and also the Superannuation Act, 1859. In the presence of the great difficulties in the way of either construction, in the presence of the judgment of the Queen's Bench Division, and of the opinion of Brett, M.R., and Lindley, L.J., I do not feel justified in expressing dissent from the view which they have taken; nor do I see that any

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good is to be gained by pointing out the difficulties which appear to me to remain in the way of the view which the Court has taken. I must add, however, that I follow the judgment of the rest of the Court with great doubt and hesitation, and I cannot say that I should myself have arrived at the same conclusion.

Appeal dismissed.

Solicitor for prosecutors: *Solicitor to the Treasury.*
Solicitor for defendants: *Richard Nicholson.*

J. E. H.

May 11.

[IN THE COURT OF APPEAL.]

GRAY *v.* STAIT AND ANOTHER.

Landlord and Tenant—Distress—Fraudulent Removal of Goods—Termination of Tenancy—Possession of Tenant—8 *Anne*, *c.* 14, *ss.* 6, 7—11 *Geo.* 2, *c.* 19, *s.* 1.

A landlord cannot follow and distrain his tenant's goods which have been fraudulently removed to prevent a distress for rent due, if at the time of the distress the tenant's interest in the demised premises has come to an end and he is no longer in possession.

The plaintiff was tenant to the defendant of a house. The defendant having terminated the tenancy, the plaintiff removed his goods on the day of its termination, and on the same day gave up possession of the house to the defendant. One quarter's rent was due on the day when the tenancy terminated, and as that remained unpaid, within thirty days of the removal the defendant followed the plaintiff's goods to the place of removal, and there distrained them. An action having been brought for wrongful distress, the jury found that the goods had been fraudulently removed in order to prevent a distress:—

Held, that, notwithstanding the finding of the jury, the plaintiff was entitled to judgment.

THIS was an action for wrongful distress, and was tried before Lopes, J., in Middlesex, when the following facts were proved:—

The plaintiff was tenant to the defendant, Stait, of a dwelling-house, 2, Stamford Brook Cottages, Hammersmith, and the defendant Hayes was a broker. The plaintiff's tenancy was determined by the defendant, Stait, on the 29th of September, 1881, and on that day the plaintiff gave up possession to that defendant, and removed to Pavilion Road, Turnham Green. At the time when

he plaintiff left, the sum of 7*l.* 10*s.*, being the quarter's rent due n the 29th of September, was owing to the defendant. On the 8th day of October certain men broke and entered the plaintiff's welling-house, Pavilion Road, and distrained and took the goods f the plaintiff as a distress for the arrears of rent, and continued n the plaintiff's dwelling-house for eight days. The men who istrained the plaintiff's goods were employed by the defendant, Iayes, and they acted with the knowledge and authority and y the direction of the defendant Hayes and also of the defendant Stait.

The defence was that the plaintiff had fraudulently and clan-estinely carried off from 2, Stamford Brook Cottages, his goods nd chattels, and had conveyed them to Pavilion Road in order o prevent the defendant Stait from distraining them. The laintiff's goods were removed on the 27th, 28th, and 29th of September. Within thirty days after the removal of the plain-iff's goods the servants of the defendant Hayes, acting as agents or the defendant Stait, entered into the plaintiff's dwelling-house n Pavilion Road, and there seized and took his goods and chattels s a distress for the rent.

The jury found that the plaintiff had removed his goods raudulently.

Lopes, J., was of opinion that the question of law to be deter-nined was whether a landlord could follow the tenant's goods fter the tenancy had expired, and after the tenant had abandoned he demised premises. In the present case the distress was learly illegal, unless it could be justified under 11 Geo. 2, c. 19, . 1. That statute was substantially a re-enactment of 8 Anne, . 14, s. 2 (1), which was intended to apply to only two classes f cases, namely, (1) existing tenancies, and (2) those cases where enancies had existed and the former tenants were holding over. f the statute had been intended to have a wider operation there ould have been no necessity for ss. 6, 7; and the powers of the andlord were not carried further by 11 Geo. 2, c. 19, s. 1. The earned judge, therefore, ordered judgment to be entered for the laintiff for 1*s.*

The defendants appealed.

(1) Repealed by the Statute Law Revision Act, 1867 (30 & 31 Vict. c. 59).

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J. M. Moorsom, for the defendants. The question is whether 11 Geo. 2, c. 19, s. 1, applies where the tenancy has expired. The power to follow goods clandestinely removed in order to avoid a distress, was originally conferred by (1) 8 Anne, c. 14, s. 2, now repealed: the statute now in force is 11 Geo. 2, c. 19, s. 1, which is substantially the same, except that the time is extended within which the distress may be made.

[BRETT, M.R. It was held by Lopes, J., that although the

(1) By 8 Anne, c. 14, s. 2, power was given to a landlord to distrain goods fraudulently removed within the space of five days. This enactment is repealed by the Statute Law Revision Act, 1867 (30 & 31 Vict. c. 59).

By 8 Anne, c. 14, s. 6, "And whereas tenants pur auter vie, and lessees for years or at will, frequently hold over the tenements to them demised after the determination of such leases; and whereas after the determination of such or any other leases, no distress can by law be made for any arrears of rent that grew due on such respective leases before the determination thereof; it is hereby enacted by the authority aforesaid that . . . it shall and may be lawful for any person or persons having any rent in arrear or due upon any lease for life or lives, or for years, or at will, ended or determined, to distrain for such arrears, after the determination of the said respective leases, in the same manner as they might have done if such lease or leases had not been ended or determined."

Sect. 7: "Provided that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due."

By 11 Geo. 2, c. 19, s. 1: "In case any tenant or tenants, lessee or lessees, for life or lives, term of years, at will, sufferance, or otherwise, of any messuages, lands, tenements, or hereditaments, upon the demise or holding whereof any rent is or shall be reserved, due, or made payable, shall fraudulently or clandestinely convey away or carry off or from such premises, his, her, or their goods or chattels, to prevent the landlord or lessor, landlords or lessors, from distraining the same for arrears of rent so reserved, due, or made payable; it shall and may be lawful to and for every landlord or lessor, landlords or lessors, within that part of Great Britain called England, dominion of Wales, or the town of Berwick-upon-Tweed, or any person or persons by him, her, or them for that purpose lawfully empowered, within the space of thirty days next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels, wherever the same shall be found, as a distress for the said arrears of rent; and the same to sell, or otherwise to dispose of, in such manner as if the said goods and chattels had actually been distrained by such lessor or landlord, lessors or landlords, in and upon such premises, for such arrears of rent; any law, custom, or usage to the contrary in anywise notwithstanding."

plaintiff's goods were fraudulently removed, and were removed during the tenancy, yet, as the goods were seized after the conclusion of the tenancy, this action for wrongful distress was maintainable. The argument for the defendants really is, that as the landlord might have distrained, after the termination of the tenancy, upon the premises if the tenant had continued in possession, he could lawfully distrain off the premises although the tenant had given up possession.]

The present question has never before arisen, and there is no authority precisely in point. The defendant was, at all events, entitled to distrain the goods removed on the 29th of September, when the quarter's rent became due: *Dibble* v. *Bowater*. (1) It was intended by 11 Geo. 2, c. 19, s. 1, that the landlord should have a summary remedy for a fraudulent removal, and should not be driven to a barren right of action: *Opperman* v. *Smith*. (2) In *Nuttall* v. *Staunton* (3) it was held that a landlord might lawfully distrain where the tenant, by his permission, had remained in possession of part of a farm after the expiration of the tenancy.

Upjohn, for the plaintiff. It was intended by 11 Geo. 2, c. 19, s. 1, to confer upon a landlord a power of distraining, of which he had been deprived by his tenant's fraud. In the present case the tenant, the plaintiff, went out on the 29th of September, and the landlord, the defendant Stait, distrained on the 18th of October: the plaintiff committed no fraud: it was not wrongful in him to remove his goods and to go out of the house of the defendant Stait, for it was his duty to give up possession on the 29th of September. Further, the statute gives no power to distrain unless the goods are removed after the rent is in arrear: *Rand* v. *Vaughan*. (4) It is clear that when a tenant has given up possession, his goods cannot be distrained: *Taylerson* v. *Peters*. (5)

J. M. Moorsom, in reply. The answer to the argument founded upon *Taylerson* v. *Peters* (5) is, that in that case at the time of the distress another tenant had come into possession.

BRETT, M.R. The defendants cannot get over this difficulty,

(1) 2 E. & B. 564; 22 L. J. (Q.B.) 396.
(2) 4 D. & R. 33.
(3) 4 B. & C. 51.
(4) 1 Bing. N. C. 767.
(5) 7 A. & E. 110.

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namely, that if there had been no fraudulent removal, there could have been no lawful distress either at common law or under the statutes.

In this case the action is brought for a wrongful seizure of goods. The goods were seized by the authority of the defendant Stait, who had been landlord of a house let to the plaintiff. The goods seized had been on the demised premises whilst the tenancy existed; but they were removed on the 27th, 28th, and 29th of September. Rent was due at the time of the removal of those goods, which were removed on the 29th of September. The jury found that the goods had been removed with intent to prevent a seizure, and therefore had been fraudulently removed. Notwithstanding this finding, the judge entered the judgment for the plaintiff; he was of opinion that the goods had not been lawfully seized under the statutes. I think that no question can arise with regard to those goods, which were removed on the 27th and 28th of September before the quarter's rent was due; clearly they were not seized under the statutory powers. With regard to those goods which were seized on the 29th of September, when the rent was due, the question has been well argued on both sides; but in the result I think that the landlord remains unprotected, and that the decision of Lopes, J., on the point before us was right. The statute relied upon, 11 Geo. 2, c. 19, s. 1, has only a limited operation; where there has been a fraudulent removal of the tenant's goods in order to prevent a distress, it confers upon the landlord a power to distrain in those cases in which, if the goods had not been removed, he might have distrained either under the common law or under 8 Anne, c. 14, ss. 6, 7. In this case could the landlord have distrained if the goods had not been fraudulently removed? It seems to me that he could not. The 6th section of 8 Anne, c. 14, gives power to distrain after the determination of the tenancy; but this power is subject to the limitations contained in s. 7; and one of those limitations is that the distress must be levied "during the possession of the tenant from whom such arrears became due." The possession of the tenant may be either at will or by sufferance; and his goods may be distrained so long at least as he is in actual possession. The statute 11 Geo. 2, c. 19, s. 1, does not help a

landlord, who could not have levied a distress if the goods had remained on the demised premises; here the tenant at the time of the distress had no possession of the demised premises, either rightful or wrongful. The judgment of Lopes, J., was right, and the appeal must be dismissed.

COTTON, L.J. I am of the same opinion. The statute 11 Geo. 2, c. 19, s. 1, gives a power of distress over goods fraudulently removed off the premises only where they would have been distrainable if they had remained upon the premises. The power to distrain after the expiration of a tenancy is conferred by 8 Anne, c. 14, s. 6; but this power is limited by certain conditions contained in s. 7. In order to justify a distress, it is clear to me that there must be a possession, either wrongful or rightful; in the present case there was no possession of the demised premises by the plaintiff at the time of the seizure. The appeal must be dismissed.

BOWEN, L.J. I am of the same opinion. The defendants' counsel in effect contended that the landlord has a right of distress whenever the tenant's goods have been fraudulently removed, even although he would not have had a right of distress if they had not been fraudulently removed. But I cannot agree to this argument. The statute 11 Geo. 2, c. 19, s. 1, allows a distress upon goods fraudulently removed, only where a distress could have been lawfully made if they had remained upon the demised premises. The argument for the defendants is not assisted by the provisions of 8 Anne, c. 14, ss. 6, 7; these enactments merely provide that the goods of the tenant may be distrained after the expiration of the tenancy whilst he remains in possession. In the present case the plaintiff, the tenant, was not in possession, and the goods were not upon the demised premises at the time when they were seized; but the fact that the tenant's goods were upon the demised premises, would not conclusively indicate that he was in possession of the premises. Accordingly in a case of fraudulent removal like the present it would be necessary to leave to the jury the question, whether if the tenant had not fraudulently removed his goods and gone out, he would have been in

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possession merely by reason of leaving the goods upon the premises if he had left them there. This is a question which no jury could be expected to answer.

Appeal dismissed.

Solicitors for plaintiff: *Thomson & Ward.*
Solicitor for defendants: *T. Skewes Cox.*

J. E. H.

April 18.

[IN THE COURT OF APPEAL.]

THE QUARTZ HILL CONSOLIDATED GOLD MINING COMPANY *v.* EYRE.

Malicious Prosecution—Malicious Presentation of Petition to wind up Trading Company—Reasonable and Probable Cause.

An action will lie for falsely and maliciously and without reasonable or probable cause presenting a petition under the Companies Acts, 1862, 1867, to wind up a trading company, even although no pecuniary loss or special damage to the company can be proved, for the presentation of the petition is, from its very nature, calculated to injure the credit of the company.

The defendant, who had been a shareholder in the plaintiff company, instructed certain brokers to sell his shares, and signed a transfer. The brokers informed him that they could not sell the shares, but the transfer was not returned to him. After waiting ten or eleven days he presented a petition to wind up the company on the ground of fraud in its formation, and of the impossibility that it could carry on business at a profit. At the time of presenting the petition the company, which was a trading company, had property of a large amount, and its debts were trifling. The defendant was not then in fact a shareholder: his shares had been sold, and the transfer had been registered. Upon discovering that his shares had been sold, he gave notice that the petition would be withdrawn, and it was ultimately dismissed without costs. The company having brought an action for falsely and maliciously and without reasonable or probable cause presenting the petition, at the trial no proof of damage to the company was given beyond the liability to pay its own costs of defending itself against the petition; and upon this ground the company was nonsuited at the close of its case:—

Held, that although the liability to pay "extra costs" was not a ground of legal damage, nevertheless the nonsuit was wrong, and a new trial must be had, because an action would lie for falsely and maliciously and without reasonable or probable cause presenting the petition to wind up, which was necessarily injurious to the credit of the company:

Held, further, that as at the time of presenting the petition the company was an existing and going concern, and had valuable property and was solvent, unless other facts could be shewn, there was a want of reasonable and probable

cause for presenting the petition, and the opinion of the jury ought to have been taken whether the defendant had been actuated by malice:

Held, further, that if the defendant as a matter of business ought, in the opinion of the jury, to have inferred from the failure of the brokers to return the transfer, that the shares had been sold, the defendant would have had no reasonable or probable cause to suppose that he was still a shareholder.

Johnson v. *Emerson* (Law Rep. 6 Ex. 329) commented upon.

THE writ of summons was issued on the 23rd of February, 1882.

The statement of claim, in substance, alleged that the defendant, who was formerly a shareholder in the plaintiff company, falsely and maliciously and without reasonable or probable cause presented a petition under the Companies Acts, 1862, 1867, to the High Court of Justice, Chancery Division, for the winding-up of the plaintiff company by the Court, or subject to the supervision of the Court in the event of a resolution being passed for the voluntary winding-up of the company: that upon the presentation of the petition the defendant falsely and maliciously, and without reasonable or probable cause, advertised the same in the *London Gazette*, and in several daily papers: that on or about the 21st day of February, 1882, the petition was dismissed by the Court, and wholly determined in favour of the plaintiff company: by reason of the presentation of the petition and of the advertisements the plaintiff company was seriously damaged in its credit, and hampered and injured in the transaction of its business, thereby sustaining considerable loss, and it was also put to considerable expense in and about opposing the petition and procuring the dismissal thereof.

By particulars delivered in the action the costs incurred by the plaintiff company in opposing the petition to wind up were estimated at 30*l*.

The action came on for trial before Stephen, J., and the following facts were proved:—

The defendant had been the owner of 100 shares of 1*l*. each in the plaintiff company; being desirous of selling them he instructed certain brokers to dispose of them, and signed a transfer; he entrusted the brokers with the transfer and the certificates of the shares. The credit of the plaintiff company had been somewhat impaired by comments in newspapers and by a circular

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issued by a solicitor named Beall (1): the shares had fallen from a premium to about one-third of their nominal value. The brokers informed the defendant that they had been unable to sell the shares, and that they would be compelled to return to him the certificates and the transfer. These documents, however, were not returned, and the defendant, after a lapse of ten or eleven days, presented a petition to wind up the plaintiff company. The petition alleged that the company was the owner of certain properties situate in Colorado in the United States of America, for which it had agreed to pay 150,000*l.* in cash and shares: that a scheme had been devised, whereby it was arranged that the plaintiff company should be formed and promoted for the purpose of purchasing the said properties at a sum very greatly in excess of the actual value thereof: that the prospectus falsely represented the said properties as very valuable mining property: that there was no possibility of making profits to the amount suggested in the prospectus: that the memorandum of association stated that the objects of the company were to carry on the business of working gold and silver mines: that the company's properties had been bought without due inquiry: that nearly the whole of the paid-up capital had been already expended: that it was in fact impossible that the company could raise any further capital by borrowing, issuing shares, or otherwise, in consequence whereof the company was unable further to work its properties or otherwise to carry on its business: that the company had in fact carried on little business, and that it would be useless for the company to attempt to work or develope its properties or mines, for the same could not by any expenditure of money be rendered profitable or worked to advantage, so as to return any dividend upon the capital of the company. The petition, however, admitted that the company owed "no debts, or only a few trifling sums, except certain sums owing for legal expenses."

The petition for winding-up was presented on the 30th of January, 1882, and was advertised in the *London Gazette* of the 31st of January, and in the *Morning Post* and *Daily Chronicle* of the 2nd of February, 1882. The 10th of February was appointed for hearing; but immediately after the presentation of the petition

(1) See *Quartz Hill Consolidated Gold Mining Co.* v. *Beall*, 20 Ch. D. 501.

the defendant ascertained that his shares had been sold and that the transfer had been registered. He therefore gave notice that the petition would be withdrawn. The petition was never served upon the plaintiff company. Ultimately a Vice-Chancellor ordered that the petition should be dismissed without costs. (1) It appeared that in a letter written by the defendant's solicitors to the then solicitors of the plaintiff company, they had offered to withdraw the petition on payment of 100*l.* as the price of his shares and 21*l.* in addition for his costs. At the time when the petition was presented the property of the plaintiff company was worth about 50,000*l.*, and the company was a going and an existing company, although after action brought it was re-constructed. It was not disputed that frauds had been committed in the formation of the company.

Stephen, J., was of opinion that if an action for maliciously presenting a petition to wind up a company could be maintained at all, special damage must be shewn in order to support it: that in the present case no special damage was proved, "extra costs" not being recoverable under any circumstances. He also intimated that the plaintiff company had not proved a want of reasonable and probable cause. The plaintiff company was therefore nonsuited.

The Queen's Bench Division (Pollock, B., and Manisty, J.) refused a rule for a new trial, the learned judges thinking themselves bound by the decision in *Cotterell* v. *Jones*. (2)

A rule for a new trial having been granted in this Court,

April 17, 18. *J. M. Moorsom* (*E. Clarke, Q.C.*, with him), shewed cause. This action must fail upon three grounds: first, there was no evidence of legal damage to the plaintiff company; secondly, there was no evidence either of malice or of want of reasonable or probable cause; thirdly, no action of this kind will lie under any circumstances.

As to the first point, special damage must be shewn in order to maintain the action: *Savil* v. *Roberts* (3), *Purton* v. *Honnor* (4);

(1) See *In re Quartz Hill Consolidated Gold Mining Co.*, Weekly Notes, 1882, p. 27.

(2) 11 C. B. 713; 21 L. J. (C.P.) 2.

(3) 1 Salk. 13; 1 Ld. Raym. 374.

(4) 1 B. & P. 205.

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and there was no evidence that the plaintiff company had suffered any pecuniary loss or any injury to its credit from the presentation of the petition to wind up. The defendant may perhaps admit that an action will lie for wrongfully bringing some kinds of action; but at all events this is not one of them.

[BRETT, M.R. It may be said on behalf of the plaintiff company that the natural consequence of presenting a petition to wind up a company carrying on a commercial business is to injure its credit.]

The injury may be the natural, but it is not the necessary consequence; and therefore some proof of it ought to have been given. The Vice-Chancellor upon dismissing the petition to wind up refused to allow to the company the ordinary costs found to be due upon taxation of defending itself against the petition: these costs cannot be recovered in the present action, because by the decision of the Vice-Chancellor it has become a res judicata that the company shall not have them. And the extra or additional costs which would be due from the company as between solicitor and client, but which would not be due as between party and party, cannot under any circumstances be recovered. In Bullen and Leake's Precedents of Pleadings, ch. 3, p. 351 (3rd edition), it is said: "In an action for malicious prosecution of civil proceedings special damage must be charged in the declaration and proved in order to sustain the action; the extra costs incurred in successfully defending a civil action, beyond the amount of costs awarded by the Court, are not damage sufficient to maintain this action." For this proposition *Cotterell* v. *Jones* (1) is cited; and that case clearly shews that an action for maliciously and without reasonable or probable cause commencing civil proceedings will not lie without special damage, and further that extra costs are not under any circumstances recoverable. The principle laid down in *Cotterell* v. *Jones* (1) is supported by the authority of two earlier cases, *Sinclair* v. *Eldred* (2) and *Grace* v. *Morgan*. (3)

Secondly, there was no evidence either of malice or of want of reasonable or probable cause. The petition to wind up did not

(1) 11 C. B. 713; 21 L. J. (C.P.) 2.
(2) 4 Taunt. 7.
(3) 2 Bing. N. C. 534.

allege that the company was unable to pay its debts; on the contrary, the debts were admitted to be trifling.

[BRETT, M.R. That argument merely goes to shew that the petition to wind up could not be sustained owing to its defects.]

The credit of the plaintiff company had been shaken previously to the presentation of the petition, and the shares in it had fallen from a premium to one-third of their nominal value. Comments had appeared in the public newspapers, and a disparaging circular as to the condition of the company's affairs had been issued by Beall; and although the issue of the circular had been restrained by Bacon, V.C., yet the Court of Appeal discharged his order: *Quartz Hill Consolidated Gold Mining Co.* v. *Beall.* (1)

[BRETT, M.R. Were the libels of Beall, which, in the opinion of at least Bacon, V.C., ought to have been restrained by injunction, sufficient reasons for presenting the petition to wind up the company?]

It was common ground that there had been misconduct and fraud in the management of the affairs of the company. These circumstances shew that the defendant had reasonable and probable cause for presenting the petition, if he bonâ fide believed himself to be a shareholder. It may be conceded that if when the defendant presented the petition he knew himself not to be a shareholder, there was a want of reasonable and probable cause; but in fact he had been misled by his brokers, and he had reasonable and probable cause to suppose that he was still a shareholder. There was no intention to injure the plaintiff company, and an intention of that kind is necessary to support an action for malicious prosecution: *Hicks* v. *Faulkner.* (2)

[BRETT, M.R. To my mind the reasoning of the Court in *Hicks* v. *Faulkner* (2) is against the argument now addressed to us on behalf of the defendant.]

Thirdly, no action will lie under any circumstances for falsely and maliciously and without reasonable or probable cause presenting a petition to wind up a company. The procedure upon a petition of that kind is not ex parte but of a judicial character; the company has the opportunity of appearing and being heard

(1) 20 Ch. D. 501. (2) 8 Q. B. D. 167.

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in opposition to it; and if the petition be dismissed, the judge who hears the petition may award costs to the company: Companies Act, 1862, s. 86; but this is the only compensation to which the company is entitled. A petition to wind up a company greatly resembles a petition for an adjudication in bankruptcy under the Bankruptcy Act, 1869; and in *Johnson* v. *Emerson* (1) a strong opinion was expressed by Martin, B., that inasmuch as under that statute proceedings to obtain an adjudication in bankruptcy were no longer ex parte but judicial, and as the alleged insolvent had an opportunity of being heard, no action would lie for falsely and maliciously and without reasonable or probable cause procuring an adjudication in bankruptcy under the Bankruptcy Act, 1869. Martin, B., pointed out the difference between the former procedure in bankruptcy and the procedure to obtain an adjudication under the Bankruptcy Act, 1869. It is submitted that the view of the learned judge is correct, and it applies equally to a petition to wind up a company as to a petition to obtain an adjudication under the Bankruptcy Act, 1869. It is believed that except *Johnson* v. *Emerson* (1) no reported case can be found of an action for maliciously and without reasonable or probable cause procuring an adjudication under the Bankruptcy Act, 1869.

Even if this Court disagrees with the ground of the decision of Stephen, J., nevertheless his judgment must stand if it can be supported upon either of the other grounds which have been stated on behalf of the defendant.

Murphy, Q.C., and *R. O. B. Lane*, in support of the rule. This action is maintainable, because it is analogous to maliciously presenting a bankruptcy petition. Whoever wrongfully sets either the civil or the criminal law in motion, is liable in an action for the injury thereby done: *Gilding* v. *Eyre* (2); even although the wrongful act would have been harmless, if the Court had not committed a mistake in law: *Farley* v. *Danks*. (3) The evidence for the plaintiff company raised such a case of want

(1) Law Rep. 6 Ex. 329, at pp. 372, 373, 379, 380.

(2) 10 C. B. (N.S.) 592; 31 L. J. (C.P.) 174.

(3) 4 E. & B. 493; 24 L. J. (Q.B.) 244.

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of reasonable and probable cause as to cast upon the defendant the burden of rebutting it: *Cotton* v. *James* (1); *Taylor* v. *Willans*. (2) No difference exists in point of principle between actions for malicious prosecution or malicious arrest and actions for maliciously taking proceedings in bankruptcy: *Whitworth* v. *Hall*. (3) It was vexatious to present the petition merely because it was impossible to carry out the object for which the company was formed; the mines existed and had been conveyed to the company, and the property was worth a large sum, although its value might be less than had been at first supposed. The gist of the action was the falsehood and the malice of the defendant whereby injury had been done to the plaintiff: *Chapman* v. *Pickersgill* (4); and there was abundant evidence of fraud, malice, and injury in the present case: *Churchill* v. *Siggers*. (5) It is said in Co. Litt. 161 a, note 4 (iv.), that "where a civil suit is commenced falsely and maliciously, and for the mere purpose of vexation, it is actionable."

BRETT, M.R. This action, which was tried before Stephen, J., has been brought against the defendant on the ground that he falsely and maliciously and without reasonable or probable cause presented a petition for the winding-up of the plaintiff company. At the trial the only evidence given of pecuniary damage was that the plaintiff company upon the hearing of that petition, had been put to extra costs. Thereupon the learned judge, without giving a decision upon the other points of the case, directed a nonsuit, upon the ground that in order to maintain an action of this kind special damage must be shewn, and that the fact of being obliged to pay extra costs was not special damage, and, therefore, that the action would not lie. To that ruling the plaintiff company objected; however, upon an application for a rule for a new trial to the Queen's Bench Division, the learned judges agreed with Stephen, J., but solely because they were of opinion that the case was governed by *Cotterell* v. *Jones* (6); they therefore gave judgment upon the same ground as Stephen, J., without

(1) 1 B. & Ad. 128.
(2) 2 B. & Ad. 845.
(3) 2 B. & Ad. 695.
(4) 2 Wils. 145.
(5) 3 E. & B. 929.
(6) 11 C. B. 713; 21 L. J. (C.P.) 2.

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expressly deciding the other points. A rule for a new trial having been granted in this Court, cause has been shewn with great ability and great care. I assent to the suggestion, that even although we may disagree with the reasons for the decision of Stephen, J., nevertheless his judgment must stand good if it can be supported upon other grounds. We must, therefore, consider all the points urged before us.

The first question to which I shall refer is whether an action will lie for falsely and maliciously and without reasonable or probable cause presenting a petition to wind up a company, although the company has suffered no pecuniary damage besides the payment of extra costs. I entirely agree that even although civil proceedings are taken falsely and maliciously and without reasonable or probable cause, nevertheless no action will lie in respect of them, unless they produce some damage of which the law will take notice. The present action is in tort, and in order to support it the plaintiff company must have sustained some damage such as the law takes notice of. I assent to the objection taken by the defendant's counsel that the obligation to pay extra costs is not damage of that kind. The theory of extra costs is that they are not necessary to the purposes of the party who has incurred them. When the costs are taxed as against the losing party in the litigation, he is bound to pay only what are called technically "the costs between party and party;" and the successful party is left to pay what are called technically "the extra costs." The theory is that the costs which the losing party is bound to pay, are all that were necessarily incurred by the successful party in the litigation, and that it is right to compel him to pay those costs because they have been caused by his unjust litigation; but that those which are called "extra costs," not being necessarily incurred by the successful party in order to maintain his case, are not incurred by reason of the unjust litigation. It may be quite reasonable as between the successful party and his solicitor that the "extra costs" should be paid to that solicitor; but it is unreasonable that the losing party should pay them, they not having been caused by his litigation. If this be taken to be the reason why "extra costs" are not allowed upon taxation, it is obviously immaterial whether or not

the litigation was false and malicious and without reasonable or probable cause; the "extra costs" are not damage caused by the unjust litigation, and therefore they are not damage for which an action will lie.

When we look back to the decisions of the judges of earlier times (which decisions are to my mind the best guides for judges of the present day), we find it laid down by Holt, C.J., in *Savil* v. *Roberts* (1), that there are three heads of damage which will support an action for malicious prosecution. There is damage to a man's person, as when he is taken into custody, whether that be, as in former times, upon mesne process or upon final process, or whether it be upon a criminal charge. To take away a man's liberty is damage, of which the law will take notice. Secondly, to cause a man to be put to expense is damage, of which the law will take notice. But Holt, C.J., adds a third head of damage, and that is where a man's fair fame and credit are injured. This is also a head of damage of which the law will take notice. Under the old law as to bankruptcy it was held that where a man was falsely and maliciously and without reasonable or probable cause made a bankrupt, two kinds of legal injury were inflicted upon him: first, in order to get rid of the bankruptcy, he was obliged to incur expense, and that was an injury; secondly, it was held that to allege of a trader that he was insolvent and liable to be made a bankrupt, was injury to his fair fame and credit, of which the law would take notice. Therefore under the old system of bankruptcy a trader had a good cause of action, if he was made a bankrupt falsely and maliciously and without reasonable or probable cause. In *Johnson* v. *Emerson* (2) it was suggested by Martin, B., that under the present law as to bankruptcy an action could not be maintained for falsely and maliciously and without reasonable or probable cause procuring an adjudication in bankruptcy, because under the Bankruptcy Act, 1869, the proceedings commenced by a petition for adjudication of which the alleged insolvent may get rid, and upon which the Court is to act, and the adjudication will not be made unless the Court is advised that the petition is well founded, and further,

(1) 1 Ld. Raym. 374.

(2) Law Rep. 6 Ex. 329, at pp. 372, 373, 379, 380.

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because a wrongful adjudication can be obtained only by an erroneous decision of the Court, and a party to the proceedings cannot be held liable for the erroneous decision of the Court, unless he has procured it by fraud and perjury, for which he may be held criminally responsible and accordingly punished. This is in substance the view suggested by Martin, B., but it was not adopted by the other judges of the Court of Exchequer, and I think that it cannot be maintained. The fault of the proposition involved in this view is that it is too large. The proposition is that an action cannot be maintained because the petitioning creditor merely asks the Court to act judicially, and because it was to be assumed that the Court would decide rightly. If that proposition were well founded, it would be an answer to an action for malicious prosecution on a criminal charge, because even in that case the prosecutor merely asks the tribunal to decide upon the guilt of the person whom he charges. If a man is summoned before a justice of the peace falsely and maliciously and without reasonable or probable cause, he will be put to expense in defending himself, and his fair fame may suffer from the accusation: nevertheless, the prosecutor only asks the justice to adjudicate upon the charge. Therefore it is not a good answer to an action for maliciously procuring an adjudication in bankruptcy to say, that the alleged creditor has only asked for a judicial decision. It seems to me that an action can be maintained for maliciously procuring an adjudication under the Bankruptcy Act, 1869, because by the petition, which is the first process, the credit of the person against whom it is presented is injured before he can shew that the accusation made against him is false; he is injured in his fair fame, even although he does not suffer a pecuniary loss. That seems to be the ground upon which Cleasby, B., supported the action in *Johnson* v. *Emerson* (1), and I think that his view was right. By proceedings in bankruptcy a man's fair fame is injured just as much since the Bankruptcy Act, 1869, as it was before, because he is openly charged with insolvency before he can defend himself. It is not like an action charging a merchant with fraud, where the evil done by bringing the action

(1) Law Rep. 6 Ex. 329, at p. 340.

is remedied at the same time that the mischief is published, namely, at the trial.

The present case, therefore, is reduced to this question, namely, is a petition to wind up a company more like an action charging fraud or more like a bankruptcy petition? In my opinion it is more like a bankruptcy petition, and the very touchstone of this point is that the petition to wind up is by force of law made public before the company can defend itself against the imputations made against it; for the petitioner is bound to publicly advertise the petition seven days before it is to be heard and adjudicated upon: Gen. Order, November, 1862, under the Companies Act, 1862, rule 2. Therefore, I venture to differ from the judges of the Queen's Bench Division in their decision that this case is to be governed by the rule applicable to an action, and I differ from them when they held, as in effect they must be assumed to have done, that although a petition to wind up a trading company be presented falsely and maliciously and without reasonable or probable cause, an action will not lie; I think that under those circumstances an action will lie.

But I must now deal with another point taken by the defendant's counsel to support the judgment of Stephen, J., although it is not the ground upon which the judgment was given; it is that no sufficient evidence was produced to warrant a judge in holding that there was a want of reasonable and probable cause. The learned judges in the Queen's Bench Division expressed no opinion as to this point. I will mention the material circumstances. The petition was to wind up the plaintiff company; the evidence was that the company even at the date of the commencement of the present action was an existing and going company, and that the property of the company, which it was formed to work, was still valuable and worth 50,000*l*. There was certainly evidence that the company had been defrauded by promoters into paying a very large price for the property, and that the company was about to take proceedings to recover back part of that price; but if after having paid that price the company still existed and was a going company, I cannot think that the existence of the alleged fraud could give any reasonable or probable cause to the defendant to petition to wind up the company.

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It was alleged in the defendant's favour also that he had reasonable or probable cause for presenting the petition, because articles had appeared in the public newspapers casting odium or a blemish upon the company. As to this I wish to say in the clearest terms, that in my opinion no person has a right to present a petition to wind up a company on the mere fact that allegations against the company have been published in newspapers; because, to maintain the contrary, the legal proposition must be that without making any inquiry whether those allegations in the newspapers were true or false, and without taking the trouble to discover whether they were not subject to the errors frequently occurring in newspaper reports, a person is at liberty to take a step which may possibly destroy the credit of a trading company. It seems to me most unreasonable to suppose that there can be any rule of law of that kind.

Another ground of complaint was made against the present defendant, namely, that at the time when he presented the petition he was not a shareholder, having transferred his shares. That was true, and he could not lawfully present the petition. But it was urged in his favour that he had reasonable and probable cause to suppose that he had not transferred his shares, and that he was still a shareholder. The circumstances were these: the defendant had directed his shares to be sold by brokers; he had signed a transfer and had forwarded it to the brokers. He was told by them that nevertheless they could not get rid of the shares, but for ten or eleven days the transfer had not been sent back to him, and in point of fact the shares had been sold and the transfer was registered. The question, whether under this state of circumstances the defendant had reasonable and probable cause to suppose that he was still a shareholder, seems to me to depend on an inference of fact. If a person who has signed a transfer of shares and has handed it to his brokers and has not received it back after the space of ten or eleven days, ought in the ordinary course of business to have assumed that the transfer had been effectual, even although he had been told by his brokers that they could not sell the shares, upon this being found as a fact by the jury, the judge ought to hold that there was no reasonable or probable cause for the defendant to suppose

himself to be a shareholder. This point raises the difficulty which often occurs in actions for malicious prosecution, namely, that before a judge can rule as matter of law, whether or not there has been a want of reasonable and probable cause, he must ask of the jury a question as to the facts.

But on the other ground which I have mentioned, namely, the actual financial condition of the company, the judge ought to have held, unless further evidence was adduced, that there was a want of reasonable and probable cause for presenting the petition.

It was necessary that the plaintiffs should give evidence also that the defendant had acted maliciously. Whenever in an action for malicious prosecution the judge holds that there is a want of reasonable and probable cause, there is evidence to go to the jury of malice. When there is no other evidence of malice except what the judge has stated to be in his opinion a want of reasonable or probable cause, I incline to agree with Huddleston, B., and Hawkins, J., in *Hicks* v. *Faulkner* (1), that upon the question of malice the jury are not bound by the holding of the judge as to the absence of reasonable cause, but they may consider whether in their own view there was a want of reasonable or probable cause. But the plaintiffs might have relied upon other facts; and it appears probable that the defendant in presenting the petition to wind up the company was actuated, not by a desire to benefit the shareholders, but by an indirect motive, namely, a wish to get back the money paid by him for the shares. This would be evidence to go to the jury. The defendant might have met it in various modes; nevertheless there was evidence of malice to be considered by the jury, even if it consisted only of want of reasonable and probable cause.

Therefore I cannot agree with Stephen, J. It may be that the House of Lords will agree with him and will say that he was right; but as at present advised, I do not agree with him that in this case he could direct a nonsuit. Of course I cannot say that we have the materials before us on which we can enter final judgment; and the result is, that in my opinion there must be a new trial.

(1) 8 Q. B. D. 167, at pp. 174, 175.

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BOWEN, L.J. I am of the same opinion, and, notwithstanding the importance of this case, I should not have added any words of my own to what has fallen from the Master of the Rolls, if it had not been more respectful, as we are overruling the opinion of more than one judge of great experience and ability, to give shortly the reasons why I think that there should be a new trial.

The plaintiff company complains that the defendant falsely and maliciously presented a petition to wind it up. When the action came on to be tried before Stephen, J., at the conclusion of the plaintiff's case the learned judge nonsuited the company, on the ground that if the action would lie under any circumstances, at all events it would not lie without proof of special damage. Without actually deciding the point, he expressed an opinion that the plaintiff company had failed to make out malice or a want of reasonable or probable cause, and the burden of proving each of these elements in the case lay on the company. He thought that the defendant had pointed out a fatal blot in the company's case by reason of a failure to shew such special damage as would maintain the action.

The first question to be considered is, whether an action will lie for falsely and maliciously presenting a petition to wind up a company; and the second is, whether an action will lie without further proof of special damage than was presented to the judge in this case. I think that both the questions can be answered at once because, as it seems to me, the discussion which exhausts the one, presents the materials for determining the other. I start with this, that at the present day the bringing of an action under our present rules of procedure, and with the consequences attaching under our present law, although the action is brought falsely and maliciously and without reasonable or probable cause, and whatever may be the allegations contained in the pleadings, will not furnish a ground for a subsequent complaint by the person who has been sued, nor support an action on his part for maliciously bringing the first action. To speak broadly, and without travelling into every corner of the law, whenever a man complains before a court of justice of the false and malicious legal proceedings of another, his complaint, in order to give a

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good and substantial cause of action, must shew that the false and malicious legal proceedings have been accompanied by damage express or implied. The reason why, to my mind, the bringing of an action under our present rules of procedure and under our present law, even if it is brought without reasonable or probable cause and with malice, gives rise to no ground of complaint, appears to me easily to be seen upon referring to the doctrine laid down by Holt, C.J., in *Savile* v. *Roberts*. (1) He there said that there were three sorts of damage, any one of which would be sufficient to support an action for malicious prosecution. "(1.) The damage to a man's fame, as if the matter whereof he is accused be scandalous. And this was the ground of the case between Sir Andrew Henley and Dr. Burstall: Raym. 180. . . . . (2.) The second sort of damages, which would support such an action, are such as are done to the person; as where a man is put in danger to lose his life, or limb, or liberty, which has been always allowed a good foundation of such an action. . . . . (3.) The third sort of damages, which will support such an action, is damage to a man's property, as where he is forced to expend his money in necessary charges, to acquit himself of the crime of which he is accused, which is the present charge. That a man in such case is put to expenses, is without doubt, which is an injury to his property, and if that injury is done to him maliciously, it is reasonable that he shall have an action to repair himself." It is clear that Holt, C.J., considered one of those three heads of damage necessary to support an action for malicious prosecution. To apply this test to any action that can be conceived under our present mode of procedure and under our present law, it seems to me that no mere bringing of an action, although it is brought maliciously and without reasonable or probable cause, will give rise to an action for malicious prosecution. In no action, at all events in none of the ordinary kind, not even in those based upon fraud where there are scandalous allegations in the pleadings, is damage to a man's fair fame the necessary and natural consequence of bringing the action. Incidentally matters connected with the action, such as the publication of the proceedings in the action, may do a man an injury;

(1) 1 Ld. Raym. 374, at p. 378.

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but the bringing of the action is of itself no injury to him. When the action is tried in public, his fair fame will be cleared, if it deserves to be cleared: if the action is not tried, his fair fame cannot be assailed in any way by the bringing of the action. Apply the second head of damage, namely, those injuries which are done to the person: the bringing of no action under our present law and under the ordinary rules of procedure will involve as a necessary and natural consequence damage to the person. The third sort of damage, the existence of which will support such an action as this, is damage to a man's property. The same observation applies to this third head of damage. The bringing of an ordinary action does not as a natural or necessary consequence involve any injury to a man's property, for this reason, that the only costs which the law recognises, and for which it will compensate him, are the costs properly incurred in the action itself. For those the successful defendant will have been already compensated, so far as the law chooses to compensate him. If the judge refuses to give him costs, it is because he does not deserve them: if he deserves them, he will get them in the original action: if he does not deserve them, he ought not to get them in a subsequent action. Therefore the broad canon is true that in the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution. I do not say that if one travels into the past and looks through the cases cited to us, one will not find scattered observations and even scattered cases which seem to shew that in other days, under other systems of procedure and law, in which the consequences of actions were different from those of the present day, it was supposed that there might be some kind of action which, if it were brought maliciously and unreasonably, might subsequently give rise to an action for malicious prosecution. It is unnecessary to say that there could not be an action of that kind in the past, and it is unnecessary to say that there may not be such an action in the future, although it cannot be found at the present day. The counsel for the plaintiff company have argued this case with great ability; but they cannot point to a single instance since Westminster Hall

began to be the seat of justice in which an ordinary action, similar to the actions of the present day, has been considered to justify a subsequent action on the ground that it was brought maliciously and without reasonable and probable cause. And although every judge of the present day will be swift to do justice and slow to allow himself as to matters of justice to be encumbered with either precedents or technicalities, still every wise judge who sits to administer justice must feel the greatest respect for the wisdom of the past, and the wisdom of the past presents us with no decisive authority for the broad proposition in its entirety which the counsel for the plaintiff company have put forward.

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But although an action does not give rise to an action for malicious prosecution, inasmuch as it does not necessarily or naturally involve damage, there are legal proceedings which do necessarily and naturally involve that damage; and when proceedings of that kind have been taken falsely and maliciously, and without reasonable or probable cause, then, inasmuch as an injury has been done, the law gives a remedy. Such proceedings are indictments—I do not say every indictment, but I mean all indictments involving either scandal to reputation or the possible loss of liberty to the person, that is, all ordinary indictments for ordinary offences. In its very nature the presentation or the prosecution of an indictment involves damage, which cannot be afterwards repaired by the failure of the proceedings, to the fair fame of the person assailed, and for that reason, as it seems to me, the law considers that to present and prosecute an indictment falsely and without reasonable or probable cause, is a foundation for a subsequent action for a malicious prosecution.

But there are other proceedings which necessarily involve damage, such as the presentation of a bankruptcy petition against a trader. In the past, when a trader's property was touched by making him a bankrupt in the first instance, and he was left to get rid of the misfortune as best he could, of course he suffered a direct injury as to his property. But a trader's credit seems to me to be as valuable as his property, and the present proceedings in bankruptcy, although they are dissimilar to proceedings in bankruptcy under former Acts, resemble them in this, that they strike home at a man's credit, and therefore I think the view of

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those judges correct who held, in *Johnson* v. *Emerson* (1), that the false and malicious presentation, without reasonable and probable cause, of a bankruptcy petition against a trader, under the Bankruptcy Act, 1869, gave rise to an action for malicious prosecution.

I wish to suggest an analogy, not with the view of laying down any principle of law, but rather because it is a matter which may throw light on what I have been saying, and nothing which has fallen from the Master of the Rolls leads me to suppose that anything which I am about to say is contrary to what he thinks. In my opinion some, though perhaps not a perfect, analogy may be found in the law of libel and slander. The essence of the law as to libel and slander is that the words must be published falsely and maliciously. With regard to written words or libel, the law does not require proof of special damage, but with regard to some kinds of slander or words spoken the law is different. I am aware that the point is controverted, and that it has never been exactly settled why this difference exists; but it does exist, and it is remarkable that the cases in which words spoken are actionable, are either those where damage has been actually sustained, or where the damage is of such a kind as to be involved in the slander itself, that is to say, to be the natural and necessary consequence of the words spoken, as, for example, when the slander charges that a man has been guilty of an indictable offence which is criminal and scandalous in its character, and involves the loss of liberty or fair fame. What other slanders are actionable? Those which impute to a man a disease necessarily rendering him unfit for society, and those which touch a man in his trade or profession. Put those two classes together—the class of malicious prosecutions which the law recognises and the class of slanders which the law recognises—and although the two may not be based on exactly the same principles, perhaps a student may find material for pursuing the analogy between them.

In the present instance we have to consider whether a petition to wind up a company falls upon the one side of the line or the other—whether, as the Master of the Rolls has said, it is more like an action which does not necessarily involve damage, and therefore will not, however maliciously and wrongfully brought,

(1) Law Rep. 6 Ex. 329.

justify an action for malicious prosecution, or whether it is more like a bankruptcy petition. I do not see how a petition to wind up a company can be presented and advertised in the newspapers without striking a blow at its credit. I suppose that most of the lawyers of the present day have seen a great increase of three kinds of abuses, all of which are indulged in for the purpose of extorting the payment of some debt, which ought to be the subject of some civil redress. There is the abuse of the police courts when their process is used to extort money; there is the abuse of the bankruptcy law; and there is the abuse of the provisions in the Companies Act, 1862, for winding up companies. In all these three forms of abuse the aim is to wreck credit, and I should be sorry to think that since they all involve a blow at the credit of those against whom they are instituted, the law did not afterwards place in the hands of the injured and aggrieved persons who have been wrongfully assailed, a means of righting themselves and recouping themselves, as far as can be, for the mischief done to them. I therefore answer the two first questions—whether this action will lie, and whether it will lie without further proof of special damage—in the following manner: I think that the action will lie, for the reason that special damage is involved in the very institution of the proceedings (which ex hypothesi are unjust and without reasonable or probable cause) for the purpose of winding up a going company.

That being established, the only matter that remains to be considered is whether in this action, at the close of the plaintiffs' case, the judge at the trial might have held that there was no want of reasonable or probable cause, and there was no evidence of malice. It was of course for the plaintiffs to prove both; but I think that the learned judge could not have held that there was reasonable and probable cause, and that there was no evidence of malice, at all events, without taking the finding of the jury.

The defendant was not the holder of any shares, and yet he presented a petition to wind up the company as if he were. At first sight that would appear to be a monstrous proceeding. But the defendant contends that although he was not the holder of any shares, nevertheless, owing to the conduct of his brokers, he was justified, as a reasonable man, in thinking that he held the shares.

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That seems to involve a question for the jury. There were ten or eleven days during which he had received no notice from his brokers, and had left in their hands the transfer for registration. He had told the brokers to complete, and that he should look to them if they did not succeed in completing. He did not during those ten days write again to ask what they had done, but without inquiry he assumed that they had done nothing, and that the transfer had not been registered, and therefore he presented the petition for winding-up. I abstain from pronouncing any opinion as to these matters, as the case is again to go before a jury, but I think that the opinion of a jury ought to be taken whether that was a reasonable course on the part of a business man, and if I were the judge to try the case, my view as to reasonable and probable cause might be influenced by the jury's opinion as to the facts. But, further, as to the solvency of the company, can it be said on these materials alone, that there was reasonable and probable cause for presenting the petition to wind up the plaintiff company without making further inquiry? I think not: at all events, I think that if the evidence had stopped here, the learned judge would have had no right to hold that the plaintiff company had failed to prove an absence of reasonable and probable cause.

As to malice, it seems to me that if the learned judge ought to have left to the jury some question with regard to the absence of reasonable and probable cause, he must have let the question of malice also go to the jury, because if they should find that the act of the defendant in seeking to wind up the company was wholly unreasonable, that would be a matter to be considered by the jury in coming to the conclusion whether there was malice or not on the part of the defendant in acting as he did. The defendant's counsel urged on us with great skill and force that the defendant had a bonâ fide belief that he was still the holder of the shares; but that does not conclude the question of malice. He may have thought that he was still a shareholder; and yet he may have presented the petition against the company from an indirect motive, that is to say, not with the desire to have the company wound up on reasonable grounds, but with the intention of wrecking the company unless under the pressure of the petition they should comply with his demand. That is a question for the

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jury; and it appears to me, for the reasons given by the Master of the Rolls that the action must go down for a new trial. I hope that I have not weakened the force of those reasons by stating my own; but I have thought it right to comment upon the case from my own point of view out of respect to the Court below and to the judge who tried the case.

Rule absolute.

Solicitors for plaintiffs: *Snell, Son, & Greenip.*
Solicitors for defendant: *Bolton, Robbins, & Busk.*

J. E. H.

[IN THE COURT OF APPEAL.]

June 30.

HOWARD *v.* MAITLAND.

Vendor and Purchaser—Breach of Covenant for quiet Enjoyment—Decree in Equity a Disturbance in Possession.

In a conveyance of land by the defendant to the plaintiff the defendant covenanted for title and quiet enjoyment notwithstanding any act or thing done or suffered by him or by any of his ancestors or predecessors in title. After the conveyance a decree was made in a suit in Chancery in which the plaintiff, though not a party, was represented as being one of a class of persons against whom the suit was brought, and by the decree the land so conveyed by the defendant was declared to be subject to a general right of common over it:—

Held, that the decree alone, without any entry or actual disturbance of the plaintiff in his possession, was no breach of the defendant's covenant for quiet enjoyment:

Held, also, that the Court, in the absence of evidence of a grant of such right of common by some predecessor in title of the defendant, would not infer that there must have been such grant so as to be a breach of his covenant for title within the meaning of the covenant.

ACTION for damages for breach of covenants for title and quiet enjoyment.

In 1864 the plaintiff purchased of the defendant for 650*l.* a piece of land consisting of about ten acres in Epping Forest which was part of the waste land of the manor of Loughton, of which the defendant was lord, and by the deed of conveyance of the land to the plaintiff the defendant covenanted as follows: "The said John Whitaker Maitland doth hereby for himself, his

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heirs, executors, and administrators, covenant with the said Samuel Lloyd Howard, his heirs, appointees, and assigns, that notwithstanding any act or thing by the said John Whitaker Maitland, or any of his ancestors or predecessors in title, made, done, or executed, or knowingly suffered, he the said John Whitaker Maitland now hath in himself good right and full power to grant and convey the said piece of land to the uses and in manner and subject as aforesaid. And that notwithstanding any such act or thing as aforesaid the same piece of land shall at all times hereafter remain and be to the uses and subject as aforesaid, and be quietly entered into and upon, and held, occupied, and enjoyed, and the rents and profits thereof received and taken by the said Samuel Lloyd Howard, his heirs, appointees, and assigns accordingly, without any lawful interruption or disturbance by him the said John Whitaker Maitland, or his heirs, or any person lawfully or equitably claiming by, from, under, or in trust for him, them, or any of them, or any of his ancestors or predecessors, and that freed and discharged or otherwise by the said John Whitaker Maitland, his heirs, executors, or administrators, sufficiently indemnified from and against all estate, incumbrances, claims, and demands whatsoever, either already or hereafter to be made, occasioned, or suffered by the said John Whitaker Maitland or his heirs, or any person lawfully or equitably claiming by, from, under, or in trust for him, them, or any of them, or any of his ancestors or predecessors."

In 1871 the suit in Chancery, *Commissioners of Sewers* v. *Glasse* (1), was brought, relating to the inclosed lands of Epping Forest, in which the defendant and other lords of manors in the forest were parties, and the plaintiff, though not a party, was represented as being one of a numerous class of persons against which it was brought. The decree of the Court in that suit was to the effect that there was a general right of common over the entire waste land of the forest which had been inclosed since August, 1851; and which included, therefore, the land sold to the plaintiff.

In consequence of this decree the Epping Forest Act, 1878 (41 & 42 Vict. c. ccxiii.), was passed for settling, inter alia, the

(1) Law Rep. 19 Eq. 134; Law Rep. 7 Ch. 456.

compensation to be paid by the corporation of the City of London, as conservators of the forest for the public, for the lands thrown open in accordance with the above decision. The plaintiff attended before the arbitrator appointed under that Act in respect of the land he had so purchased, and by the award of the arbitrator the plaintiff was allowed to retain a small portion of the land, viz., 1*r.* 17*p.*, quieted in title and released from all rights of common over it on his paying 23*l.* 2*s.* 1*d.*, and in respect of the remainder, viz., 9*a.* 1*r.* 5*p.*, which was ordered by the award to be thrown open, he was awarded 674*l.* for his interest in the soil, which sum the plaintiff stated included compensation for fencing and improvements he had made on the land.

The plaintiff complained in this action that there had been a breach of the defendant's covenant for title and quiet enjoyment by reason of the existence of the rights of common, which rights he alleged were due to some act done or suffered by the defendant's predecessors in title.

The action was tried at Westminster in 1882 before Day, J., without a jury, when that learned judge was of opinion that the decree in *Commissioners of Sewers* v. *Glasse* (1) was a breach of the defendant's covenant for quiet enjoyment, and without expressing any opinion as to any breach of the covenant for title, he held that the plaintiff was entitled to recover, and gave judgment for him for the amount of the difference between the value of the land on the date of the decree unaffected by the right of inter-commonage, and the value of the land at the same date when subject to such right.

The defendant appealed.

Rigby, Q.C., and *Finlay, Q.C.* (*Mansel Jones*, with them) for the defendant. There was no breach of the covenant for quiet enjoyment. There was no disturbance of the plaintiff in his occupation of the land which he bought of the defendant. He remained in his possession of it without any disturbance until the Epping Forest Act, 1878 (41 & 42 Vict. c. ccxiii.), was passed, and it is admitted by the plaintiff that if the decree in *Commissioners of Sewers* v. *Glasse* (1) was not a disturbance within the meaning

(1) Law Rep. 19 Eq. 134; Law Rep. 7 Ch. 456.

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of the covenant, there was no disturbance before the passing of the Epping Forest Act, 1878. No doubt the case of *Commissioners of Sewers* v. *Gellaty* (1) shews that although the plaintiff was not actually a party to the suit of *Commissioners of Sewers* v. *Glasse* (2), the decree was binding against him as regards the general right of common which it established, because it was brought against persons representing a class, and the plaintiff was therefore a party by representation. Still that case shews that the decree could not be enforced against the plaintiff without some fresh proceedings being first originated against him; therefore the decree was not itself a disturbance.

In 2 Dart on Vendors, 4th ed. p. 716, it is said that "the common covenant for quiet enjoyment is broken by a suit in Equity, although equitable disturbances be not specified," and it was on the authority of this passage that Day, J., acted in deciding that there had been a breach of the covenant for quiet enjoyment, but this refers to a suit in which the person bound by it was a party, so that the decree could be enforced against him without any fresh suit or action. It is clearly laid down in Sheppard's Touchstone, p. 171, with reference to the breach of the covenant for quiet enjoyment that "in all cases where any person hath title the covenant is not broken until some entry or other actual disturbance be made by him upon his title." And in Rawle on Covenants for Title, 4th ed. p. 143, it is shewn that unless the proceeding in Equity interferes with the title or possession, it is not a breach of the covenant for quiet enjoyment: *Hunt* v. *Danvers* (3) and *Morgan* v. *Hunt*. (4) The covenant is, moreover, limited to acts of the defendant or his predecessors in title, and there was no disturbance by or through his or their means: *Butler* v. *Swinnerton*. (5)

H. Matthews, Q.C., and *R. Reid, Q.C.*, for the plaintiff. The decree in the suit of *Commissioners of Sewers* v. *Glasse* (2) was a sufficient disturbance and interruption to be a breach of the covenant for quiet enjoyment. That decree bound the plaintiff: *Commissioners of Sewers* v. *Gellaty*. (1)

(1) 3 Ch. D. 610.
(2) Law Rep. 19 Eq. 134; Law Rep. 7 Ch. 456.
(3) Sir T. Raym. 370.
(4) 2 Vent. 213.
(5) Cro. Jac. 657; Palm. 330.

[FRY, L.J. It only bound the plaintiff as to one point, namely, the existence of a general right of common.]

The decree dealt with all the open land in Epping Forest.

[FRY, L.J. A declaration of a right is not a disturbance.]

By the decree the right to disturb the plaintiff in his possession was established, and he would have had no defence to any proceeding to enforce such right, nor would he have been able to resist any proceeding which might have been taken to remove the fences he had put up on the land. The Epping Forest Act, 1878, recites the Chancery suit, and recognises the liability of the plaintiff to be turned out of his possession. The Act was indeed a machinery for giving effect to the decree. There was also a breach of covenant for title, for the grant of the right of common must have been by some predecessor in title of the defendant.

Rigby, Q.C. for the defendant, was not called on to reply.

BRETT, M.R. In this case the action is brought upon an alleged breach of one of two covenants or of both; one of the covenants being for title, and the other for quiet enjoyment.

Now, my Brother Day did not determine the question whether there had been a breach of the covenant for title; he held there had been a breach of the covenant for quiet enjoyment, but he stated that he had decided the matter according to the best conclusion he could come to on the moment, leaving the case really to the Court of Appeal. We have now to determine this case upon our view as to both points. The principal, indeed nearly the whole of the argument, has been whether there has been a breach of the covenant for quiet enjoyment. The other point has no doubt also been argued, but almost incidentally, and as if the question upon each was in point of fact the same. I will first, therefore, see if there has been a breach of the covenant for quiet enjoyment. There was a conveyance of land in Epping Forest from the defendant to the plaintiff, the plaintiff went into possession of that land, and the question is whether he was ever disturbed within the meaning of that covenant. Now, nothing was ever actually done to interfere with his possession of that land until an award was made under the Epping

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Forest Act, 1878, when not only his possession of the land was interfered with, but his property in it was taken from him, and in respect of this he was paid according to such Act of Parliament. Therefore he was paid for such interference with the property. No doubt he got nothing in respect of his not having what he supposed he had, and his land was purchased of him as land with the right of other people to depasture upon it. Therefore the question is whether he was disturbed with regard to that which he supposed he had, and which was assumed to be conveyed to him, namely, land not subject to this commonable right. He was not disturbed in point of fact by anybody who assumed to exercise any commonable right over his land until the property in the land was taken away from him by the award under the Act of Parliament. There was, however, a decree in the case of *Commissioners of Sewers* v. *Glasse* (1), and that decree affected him to a certain extent. If anybody had attempted to exercise the commonable right over his land the decree would have prevented him from arguing that there was no such commonable right over lands in Epping Forest which were not inclosed in August, 1851, but it was no decree against him personally, nor was there an injunction against him, so that nobody by virtue of that decree alone and without some further decree or judgment, could have touched his powers within his own land. Then can it be said that that decree under those circumstances was a disturbance of the plaintiff's absolute right of possession and enjoyment within the meaning of the covenant for quiet enjoyment. It seems to me it cannot. But then it is said it is obvious that if after that decree anybody had brought an action against the plaintiff for interfering with the right of common he would have had no defence. That is true, and if anybody had brought such an action against him and had recovered judgment, I am not prepared to say that that alone might not have been a disturbance within the covenant, but that is a matter which it is not necessary to determine now, because, in fact, there was no such decree and no such judgment against him. Therefore there having been no absolute interference with the plaintiff's actual enjoyment of this land until the property in it was taken away

(1) Law Rep. 19 Eq. 134; Law Rep. 7 Ch. 456.

from him by the Epping Forest Act, 1878, it seems to me that there was no disturbance which could entitle him to maintain this action. I adopt that which is thus laid down in 1 Sheppard's Touchstone, p. 171: "And in all cases where any person hath title the covenant is not broken until some entry or other actual disturbance be made upon his title." It is clear that there was no entry here, and it seems to me that there was no actual disturbance even supposing that a decree against the plaintiff would be an actual disturbance. That is a sufficient answer to the action upon the covenant for quiet enjoyment, for as regards a disturbance by the Act of Parliament that is not a disturbance by any one of the persons against whose acts it can be possibly said that the defendant covenanted.

Then comes the question whether there was any breach of the covenant for title by any person against whose acts the defendant has covenanted. It is said there was such breach by reason of a grant of these commonable rights by some predecessor in title of the defendant. Now, no evidence has been given of any such grant by any predecessor in title of the defendant, unless it can be truly affirmed that whoever did it must necessarily have been a predecessor in title of the defendant, and it seems to me impossible to say that the grant was necessarily by a predecessor in title of the defendant. But there is another reason why it cannot be said that there was any such grant within the meaning of the covenant, namely, that it cannot be supposed that either party to this covenant contemplated a covenant against acts which are presumptions of law of such a kind as this. I do not think it was the intention of either party that any such matter should be a matter against which the defendant was covenanting. Therefore, in my opinion, there has been no breach of either covenant, and our judgment must be for the defendant.

LINDLEY, L.J. I am of the same opinion.

The covenant for title is this. [The Lord Justice here read the covenant.]

In order to recover for a breach of that covenant it must be shewn that by reason of some act or thing done or suffered by the defendant or any of his predecessors in title, he, the defendant,

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had no title to so grant the land. Now, no proof in fact of anything of that kind has been given, but we are asked to assume it by inference from the admitted fact that at some time or other rights of intercommoning over the land were acquired. I decline to do so at all, and I doubt extremely whether it was ever contemplated by either party that the covenant should extend to some immemorial right acquired nobody knows when or under what circumstances, but that on the contrary it was intended only to apply to something done within the time of legal memory. It appears to me, therefore, that so far as that covenant is concerned, there is a failure in the proof of any breach. That is a matter not altogether immaterial, because it affects the next covenant, which is the covenant for quiet enjoyment, the over-riding words of which are: "notwithstanding any such act or thing as aforesaid," which is an act done or knowingly suffered by the grantor or any of his predecessors in title. It appears to me that has a bearing upon the question of the covenant for quiet enjoyment, even assuming an interruption or disturbance. Now, has there been any interruption or disturbance such as is contemplated by this covenant? Disturbance, in fact, there has been none. According to the old authorities that would be fatal. But then we are asked to say, though there has been no disturbance in fact, and though the plaintiff enjoyed this property until the Epping Forest Act, 1878, was passed, nevertheless he is entitled to say he has been disturbed, because there was the suit of *Commissioners of Sewers* v. *Glasse* (1), a suit so constituted that, although the plaintiff was not a party to it he was bound by it, so that he could not dispute that the rights of common existed over the waste. Now, was the decree in that suit a disturbance? No authority has been cited for it, nor any that comes near it.

It appears to me, therefore, that upon both points the plaintiff fails to make out his case.

FRY, L.J. I am entirely of the same opinion. As regards the covenant for quiet enjoyment, there are two answers to the plaintiff's case. In the first place, I think he never was disturbed

(1) Law Rep. 19 Eq. 134; Law Rep. 7 Ch. 456.

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in his possession; he may have been disturbed in his mind, but in his possession he was never disturbed, except by the Epping Forest Act, 1878. The next difficulty in his way is that the covenant is confined to acts done by the defendant, or by any of his ancestors, or predecessors in title, and there is nothing to shew that the right of common whenever it was granted was granted by any of those persons. It is plain it was not granted by the defendant, or by any ancestor of his, and the only question is whether it was granted by a predecessor in title. Unless those words extend to every person in possession of this property since the foundation of the world, I do not see how it can be said it was granted by a predecessor in title.

Then with regard to the covenant for title, it appears to me, I confess, in the first place exceedingly doubtful whether the covenant is in any way broken by reason of the existence of a right of common over a piece of uninclosed land, over which, for anything that appears to the contrary, the right was exercised at the time of the covenant being made. But even supposing that to be the case, it remains to be considered whether the right of common was occasioned by any act of the defendant or of any of his ancestors, and there is nothing to shew that it was within the meaning of that covenant.

Judgment for the defendant.

Solicitor for plaintiff: *R. K. Fletcher.*
Solicitors for defendant: *Druces, Jackson, & Attlee.*

W. P.

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July 3.

[IN THE COURT OF APPEAL.]

THE QUEEN ON THE PROSECUTION OF THE BILLERICAY HIGHWAY BOARD *v.* THE JUSTICES OF ESSEX.

Highways—Highway Act, 1862 (25 *&* 26 *Vict. c.* 61), *ss.* 9 *and* 39—*Dissolution of Highway District—Highway Board existing after such Dissolution.*

By the dissolution of a highway district, in respect of which a highway board had been constituted under the Highway Act, 1862, the highway board, though it ceases to have any control over the highways in its district, does not cease to exist as a corporate body for the performance of its other duties, such as those of suing or being sued, and of acting generally for the purpose of winding up its affairs.

THIS was a rule calling on the justices of Essex to shew cause why a writ of mandamus should not issue, commanding them to enter continuances and hear an appeal in which the Shorthorn Dairy Company, Limited, were the appellants, and the Billericay Highway Board and two justices of the peace for the county of Essex were the respondents, and to hear and determine the merits thereof.

It appeared by the affidavits, that a number of parishes in the county of Essex were duly constituted a highway district under the Highway Act, 1862 (25 & 26 Vict. c. 61), under the name of the Billericay Highway District, and the duly elected waywardens of the parishes and the justices of the peace for the county residing within the district became the Billericay Highway Board.

Steps were taken to dissolve this highway district, and in October, 1882, the court of quarter sessions made a final order that the highway district should be dissolved on the 25th of March, 1883, and that all matters of account connected with the highway district should be adjusted to that date.

On the 22nd of February, 1883, the justices in petty sessions made an order for the payment by the Shorthorn Dairy Company, Limited, to the Billericay Highway Board of a sum of money for expenses incurred in repairing some of the highways of the district, repairs having been rendered necessary by damage caused by excessive weights and by extraordinary traffic thereon, viz., by a traction-engine of the company.

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The company gave notice of appeal on the 1st of March, 1883, to the next quarter sessions, which were held on the 3rd of April following. On the case coming on for hearing an objection was made for the appellants that the board had been dissolved and had ceased to exist, and consequently had no locus standi, and should not be heard. The Court held this objection to be good. The appellants' counsel then proved service of the notice of appeal, which was treated as unopposed, and the order appealed against was quashed.

This rule was then applied for and obtained at the instance of the highway board.

June 14. *Philbrick, Q.C.*, and *H. C. Bennett*, shewed cause. On the dissolution of a highway district under s. 39 of the Highway Act, 1862, that Act no longer applies, and each parish composing the district goes back under the control of the surveyor and reverts to the regulations of 5 & 6 Wm. 4, c. 50. The highway board must cease to exist with the dissolution of the district, as there cannot be two bodies having control over the highways. There is nothing to prevent the parishes in which the roads injured by the company's traffic are situated from taking proceedings and recovering for the damage done.

[They cited *R.* v. *Monmouthshire* (1); *R.* v. *Carnarvon* (2); *R.* v. *Gloucestershire.* (3)]

Poland and *Earle*, in support of the rule. This is not a question of damage to the roads in a parish or parishes, but of a debt to a corporate body. The order for the dissolution of the district takes away the control over the roads from the highway board, but they continue in existence to wind up the monetary matters of the district.

[They cited *Reg.* v. *Justices of Middlesex* (4); *Reg.* v. *Worcestershire.* (5)]

WILLIAMS, J. I am clearly of opinion that this mandamus should go. Two objections have been raised to its being issued.

(1) 4 B. & C. 844.
(2) 4 B. & A. 86.
(3) 1 B. & Ad. 1.
(4) 2 Q. B. D. 516.
(5) 3 E. & B. 477.

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First, it is said the justices have heard and determined the appeal, and if so we have no jurisdiction to make the order asked for; and, secondly, it is said that their decision, that the objection raised to the appearance of the respondents was valid, was a correct decision. In the first place I am clear that the magistrates, in adopting the view presented to them that the board had been dissolved and could not appear on the appeal as respondents, were not determining the appeal. They made no adjudication on the merits, but determined the matter entirely on a preliminary objection, the effect of which was that the appeal was taken as unopposed, and as a formal matter an order was made quashing it, without regard to the merits. If, however, the board were really non-existent, the decision of the justices was right. The highway board was duly constituted a corporation having duties and rights over the highway district and having property vested in them as a highway board. By the order of the court of quarter sessions by virtue of s. 39 of the Highway Act, 1862, the board ceased to have any power over the roads after the 25th of March. All their duties, however, did not cease then, for as from that date they were to state their accounts and distribute the money they had in hand to the parishes, and get a final audit of their accounts. To do this they must have an existence and as a corporate body, and they were not, so far as these matters go, affected by the order for the dissolution of the highway district, but have power to receive the debt due to them and to take all necessary steps to enforce it, and they owe a duty to the parishes in respect of the money when they receive it. As the justices in my opinion, refused to go into the merits of the case, but decided erroneously on a preliminary objection, the mandamus to them to hear and determine the appeal must go.

SMITH, J., concurred.

Order accordingly.

A. M.

The company appealed.

Philbrick, Q.C., and *H. C. Bennett*, for the appellants.
Poland and *Earle*, for the respondents.

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BRETT, M.R. In this case an order was obtained by the highway board, which was constituted by the Highway Act, 1862, a corporation, against the dairy company, who are the appellants; whereupon the dairy company appealed to quarter sessions against that order, and it is not denied that at the time that appeal was entered the board were the proper respondents; but, before the appeal came to be heard, the procedure took place which is pointed out by the 39th section of that Act. It is alleged on the part of the appellants that that procedure dissolved the board, and that, therefore, when the appeal came on to be heard, there were no respondents, and so the appellants were entitled to judgment for the want of any respondent appearing. On the other side it is said the board was not dissolved, and consequently that respondents still existed. If the board was dissolved and gone, it seems to me that the appeal could not be heard; but whether the appellants were entitled to judgment in the absence of the respondents I have considerable doubt. It seems to me that according to this Act of Parliament, if the board was dissolved the board had a successor, and that therefore what ought to have been done would have been to have adjourned the appeal until that successor could have come in and been made respondent, and not to have given judgment in favour of the appellants at once without hearing the other side. But if the board was not dissolved, and was then in existence, the board were the right respondents, and the decision of the magistrates cannot be supported. The real and substantial question in this case is therefore whether the board at the time this case came on for hearing was dissolved? It is alleged that it was dissolved by virtue of the Highway Act, 1862. The question then is what is the proper interpretation of that statute. It cannot be denied that the board was once rightly constituted; and by the 9th section of the Act the board so constituted was a body corporate, having a perpetual succession. Then is there anything which takes that away? It is said that the 39th section takes it away if certain things are done, but what the 39th section says is that if certain things be done, any highway district formed under the Act may be dissolved; it does not in terms say that any highway board shall be dissolved, but only that the highway

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district may be dissolved; and then it goes on to shew what is the consequence of dissolving a highway district. With regard to that it says, "when any highway district is dissolved" "the highways in such district shall be maintained and the provisions of the principal Act in relation to the election of surveyors and to all other matters shall apply to the said highways in the same manner as if such highways had never been included within the limits of a highway district." Therefore the consequence of the dissolution of the district is that the management of the highways and all such matters shall be thenceforth under the principal Act, viz., 5 & 6 Will. 4, c. 50. If then the body corporate existed only for the purpose of managing the highways, I should have thought that, inasmuch as it was no longer to manage the highways, but some one else was to do so, it was dissolved and gone by the dissolution of the highway district. But a highway board is constituted for other purposes, and with power to do more than manage the highways. It has, amongst other powers, power to make contracts, to bring or defend lawsuits, and to make rates in order to pay the expenses of lawsuits not unreasonably brought, or not unreasonably defended. Now, those are things which do not and cannot be said to fall within the management of the highways. Therefore the corporation has other duties and other powers than to manage the highways, and when it is found that upon the dissolution of the highway district it is only one set of its powers and one set of its duties which is in terms transferred to some one else, how can one necessarily imply that the corporation is thereby dissolved with regard to its other powers or its other duties. It seems to me that one cannot do so according to any proper mode of interpreting an Act of Parliament. After having heard all the arguments on the one side or the other, I think that we must come to the conclusion, which indeed was admitted by Mr. Philbrick, that the case of the appellants cannot be maintained unless by the dissolution of the highway district it was a necessary implication that the board also was dissolved. I am of opinion that that implication cannot be made, and that the board still exists for the purpose of being respondents to the appeal.

FRY, L.J. I am of the same opinion. The highway board

in this case was constituted under the Highway Act, 1862, and by the 9th section of that Act it became a body corporate with perpetual succession, and with power to acquire and hold lands. With the necessary incidents to its existence, it acquired also power to hold chattel property, and to enter into contracts that might result in debts payable by the corporation; and also, in debts payable to the corporation. Then the 39th section provides for the dissolution of any highway district constituted under the Act, in certain circumstances; but the statute is entirely silent with regard to the dissolution of the corporation.

Therefore it appears to me to be plain that the only way in which we can come to the conclusion that the corporation has been dissolved is by holding that, by some reasonable implication to be gathered from the Act of Parliament, such is the result of the Act and the intention of the legislature. So far from that being the case, it appears to me that the balance is greatly in favour of holding that the corporation continues to exist. If the corporation was dissolved, it would be necessary to inquire in whom has its property vested. It is suggested that all the land which may before have been held for the common purpose of the corporation (I am not speaking of that which was in trust for separate purposes) has become vested in the various surveyors of the highways in the various parishes, twenty-five in number, in proportion to the sums they contributed to the common fund. There is very considerable difficulty in that view, because the contribution to the common fund of the various parishes might vary from time to time, and it is obvious that difficult questions might arise before it could be known in what shares the land would vest in the various surveyors of the parishes. Then take the case of chattel property vested in the corporation at the time of the dissolution of the highway district. It is suggested that that will vest in the same manner in the former surveyors. Can anything more inconvenient be conceived than such a vesting of undivided shares of horses, carts, spades, and the necessary plant of such a corporation? Supposing some of those things should be stolen or misappropriated, are the twenty-five surveyors to bring separate actions for their separate undivided interest in this property? On the other hand, it is obvious that if the corporation remain in

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existence for the purpose of winding up its affairs, all such matters could be easily dealt with. The same observations apply to debts which may be vested in the corporation, and which they have a right to recover, or to sums due from the corporation which they are liable to pay. It has been suggested that the corporation would have no power after the dissolution of the district to levy rates for the purpose of paying any of its debts. Without expressing a definite opinion on the point, I can only say that Mr. Philbrick has not convinced me that the 33rd section of the Highway Act, 1864 (27 & 28 Vict. c. 101), would not remain in force as long as it was necessary for the purpose of obtaining money for paying debts due from the corporation. The conveniences of the corporation continuing to exist are obvious. The corporation will then be able to get in all its debts, pay all its debts, realise its property, and take any steps that may be necessary for the settlement of the accounts between the various parishes. It is said that there is an absurdity in the corporation continuing for ever to exist when it has no duties to perform. But it seems to me that by the construction we are putting on the Act no such difficulties will occur. The effect, in my judgment, of the latter part of the 39th section of the Highway Act, 1862, is that after the dissolution of the district the board will have no duties with regard to the roads, and that the parochial duty of the management of the roads as it previously existed is revived. The board will die and come to an end when it has no functions to perform, but so long as it has functions to perform it exists.

That is the view I take of the Act, and it is enough to say that Mr. Philbrick has not convinced me that it is an unreasonable one. I therefore think this appeal must fail.

Appeal dismissed.

Solicitors for appellants: *Beaumont & Warren.*
Solicitor for respondents: *W. W. Brown.*

W. P.

FUGGLE *v.* BLAND AND WIFE. 1883

Practice—Judicature Act, 1873, *s.* 25, *subs.* 8—*Appointment of Receiver—Reversionary Interest.* *Aug.* 2.

The Plaintiff, who had obtained judgment against the defendants, husband and wife, was upon his application ex parte appointed receiver of the income of the wife's reversionary interest under a will.

MOTION on behalf of the plaintiff, who had obtained judgment against the defendants for money lent, for the appointment of a receiver under s. 25, subs. 8, of the Judicature Act, 1873, and Order LII., r. 4 (1). The plaintiff's affidavit in support of the motion stated that the father of the female defendant by his will directed that trustees should invest his estate in government securities and pay the income to his wife for life, and that after her death the estate should be divided among his children. The will was proved in 1878, and the testator's widow, the mother of the female defendant, was still living. Upon application ex parte to Lopes, J., in chambers, he referred the matter to the Court.

Chadwyck Healey, in support of the motion. No reported case can be found where the Court has appointed a receiver in the case of an absolute reversionary interest like the present, but in an unreported case of *Rubenstein* v. *Gurdon*, during the last Trinity sittings, where property had been left to the defendant's mother for life and after her death to him, Pearson, J., appointed the plaintiff as receiver without salary.

THE COURT (Pollock, B., and Lopes, J.) made an order that the plaintiff be appointed without security to receive the income of the reversionary interest to which the female defendant was or might be entitled under the will.

Order accordingly.

Solicitors for plaintiff: *Sole, Turner, & Knight.*

(1) 36 & 37 Vict. c. 66, s. 25, subs. 8: A receiver may be appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made, and any such order may be made either unconditionally or upon such terms and conditions as the Court shall think just.

A. P. S.

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July 5.

BRUNSDEN *v.* HUMPHREY.

Judgment recovered—Res Judicata—Separate Actions in respect of same wrongful act—Injury to Property and Person—Damages recoverable in previous Action.

The plaintiff brought an action in the county court for damage to his cab through the defendant's negligence, and having recovered the amount claimed, brought an action in the Divisional Court against the defendant, claiming damages for personal injury sustained by the plaintiff through the same negligence:—

Held, that, inasmuch as the damages for personal injuries might have been claimed in the first action, the judgment recovered in it was a bar to subsequent proceedings.

CLAIM, that while plaintiff was driving a cab, the defendant's servant so negligently drove a two-horse van that it came into collision with the plaintiff's cab, and he was thrown from his box and injured, and incurred expenses, &c.

Defence, in the alternative, that the plaintiff issued a plaint against the defendant in the Whitechapel County Court for the cause of action mentioned in the claim, and the defendant paid 4*l.* 3*s.* and 6*s.* 1*d.* costs into court, and the plaintiff agreed with defendant to accept the said 4*l.* 3*s.* with the costs in satisfaction and discharge of the cause of action, and discontinued the plaint.

Reply, third paragraph, that at the time the plaintiff brought the action in the county court he was ignorant of the personal injuries he had suffered through defendant's negligence.

Joinder of issue.

At the trial before Grove, J., it appeared that on the 22nd of December, 1881, the plaintiff brought an action in the Whitechapel county court to recover for damage to his cab, the particulars annexed to the summons being: "For carelessly driving a van into cab 4*l.* 3*s.*

	£	*s.*	*d.*
"Repairing woodwork	1	8	0
Painting	1	5	0
Three weeks' hire of cab	1	10	0
	£4	3	0"

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The defendant paid the amount claimed into court with costs, and the action was discontinued. On the 29th of June, 1882, the plaintiff wrote to the defendant complaining for the first time that he had received personal injury at the time when his cab was damaged, and asking for compensation. This was refused, and the present action commenced. The plaintiff at the trial accounted for his delay by saying that it was not till some time after the accident that he found that he had been seriously hurt.

The jury found for the plaintiff, with 350*l.* damages, for which judgment was entered.

A rule having been obtained calling on the plaintiff to shew cause why there should not be a new trial, or judgment entered for the defendant, on the ground of misdirection in not holding that the proceedings in the county court were a bar to the present action.

July 4. *Crispe*, (*Waddy, Q.C.*, with him) shewed cause. The damages claimed and received in the county court were in respect of a cause of action different from the present, and the extent of the injury to the plaintiff could not then have been foreseen. The particulars shew that the plaint was solely in respect of damage to the cab. Here the action is for personal injuries. The two causes of action being therefore distinct, the plaintiff is not precluded from maintaining this action. [He cited, *Outram* v. *Morewood* (1); *In re Morris* (2); *Nelson* v. *Couch*. (3)]

Murphy, Q.C., (*Hannen*, with him) in support of the rule, was not heard.

July 5. POLLOCK, B. I think this rule must be made absolute. The action is brought in respect of damage done through negligence on the part of the defendant's servants. Evidence was given at the trial that the plaintiff was seriously hurt at the time when his cab was damaged, and the jury have found for him in respect of this claim. The defence pleaded was that the plaintiff had previously brought an action in the county court in respect

(1) 3 East, 346. (2) Law Rep. 1 C. C. R. 90.
(3) 15 C. B. (N.S.) 99; 33 L. J. (C.P.) 46.

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of the cause of action mentioned in the statement of claim, and having accepted money in discharge of this cause of action had discontinued his plaint.

The material allegation is that the county court proceedings were in respect of the same cause of action as the present one, and the question is, was this allegation proved at the trial? The answer to it involves some difficulty, and I wish to base my judgment entirely upon the circumstances of this particular case. The familiar rule is that a plaintiff cannot twice recover damages in respect of the same cause of action. As was said by Lush, J., in *Commings* v. *Heard* (1), "the reason why a matter once adjudicated upon is not permitted to be opened again, is because it is expedient that there should be an end to litigation." The old authorities in illustration of the rule are collected in Com. Dig. K. 3. But it is also the law, as is clearly explained in *Nelson* v. *Couch* (2), that not only is the plaintiff debarred from suing in respect of the same matter for which he has already brought an action and recovered damages, but he is equally barred where he had an opportunity of recovering the damages in the first action. If the rule were otherwise a plaintiff might split up his claim into parts and bring separate actions in respect of each of them. The fact that damages for the injury to the plaintiff could have been laid and recovered in the former action shews conclusively that the present action cannot be maintained.

LOPES, J. I am also of opinion that judgment ought to be entered for the defendant. It is quite true that in the action in the county court the plaintiff claimed and recovered nothing in respect of personal injury to himself. But the cause of action in the county court, and the matter to be determined there, was the negligence of the defendant in driving his van. The plaintiff made no claim in the county court for damages in respect of his personal injuries, but he might have done so, for the injury was caused by the same matter which was tried and determined in the county court, that is, the defendant's negligence. He is now bringing his action, not for a new wrong, but for a consequence

(1) Law Rep. 4 Q. B. at p. 673. (2) 15 C. B. (N.S.) 99; 33 L. J. (C.P.) 46.

10 Jur. N.S. 367

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of the same wrongful act which was the subject of the former suit. This, according to the authorities, cannot be done. And as there appears to be no suggestion of any fresh evidence which could alter the case, I think we ought to make the rule absolute to enter judgment for the defendant.

Rule absolute.

Solicitors for plaintiff: *Noon & Clarke.*
Solicitors for defendant: *Arkcoll & Cockell.*

NOTE.—See *Barnett* v. *Lucas*, I. R. 6 C. L. 247.

A. P. S.

HOLLINS *v.* VERNEY.

June 20.

Easement—Prescription Act (2 & 3 *Wm.* 4. c. 71), *s.* 2—*Right to use Way for the Removal of Timber—User at long Intervals—"Enjoyment for full period of Twenty Years."*

In an action where a right of way was claimed under the Prescription Act (2 & 3 Wm. 4, c. 71), s. 2, in respect of twenty years' user as of right, it appeared that the way had only been used by the party claiming it, the defendant, for the removal of wood cut upon an adjoining close. The wood was cut upon this close at intervals of several years; the last cutting having been in the year in which the action was commenced, the one next previous fifteen years before, and the next at another interval of fifteen years. Between these intervals the road was occasionally stopped up, but the defendant used it as often as he wished while the wood was being cut:—

Held, that there had not been an uninterrupted enjoyment of the way for twenty years within the meaning of s. 2 of the Prescription Act, which did not apply to so discontinuous an easement as that claimed.

ACTION for trespass on the land of the plaintiff.

Defence, that the alleged trespasses were committed in the exercise of a right of way for cutting wood under the Prescription Act.

At the trial before Cave, J., at the Nottingham Assizes in February, 1883, it appeared that the way in question was an ordinary metalled road which led to some large cotton mills, the property of the plaintiff, and passed along a wood of 200 or 300 acres the property of the defendant. There was a gate from this road into the wood, and the wood for about half a mile sloped sharply down to the road. At the end of the slope there was a way by which carts could pass from the road to the upper part of the

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wood. The timber and underwood on the whole of this slope were not cut at one and the same time, but in parts and in rotation, at intervals of several years, the whole of the slope being cleared about every fifteen years.

Witnesses were called on behalf of the defendant, who proved that they had purchased the wood at each cutting and carted that which was cut upon the upper part of the slope down to and along the road without any interruption, and that this had continued for more than thirty years down to the commencement of the action; the last cutting having been in the year in which the action was commenced, the previous cutting fifteen years before, and the next at another interval of fifteen years. Between these intervals the way was occasionally stopped up.

The learned judge told the jury that the fact that the passage from the road to the wood was occasionally stopped up would not destroy the defendant's right if he had for more than twenty years used it as often as he wished, that is, while the wood was being cut, and he left to them the question whether there had been a user of the way for twenty years within the statute. The jury found for the defendant.

A rule having been obtained for the defendant to shew cause why there should not be a new trial on the ground of misdirection in leaving the case to the jury, as the only right in support of which evidence was given was not within the Act,

W. Graham, (*J. C. Lawrance, Q.C.*, with him), shewed cause. The substantial question at the trial was whether there had been an uninterrupted enjoyment of the right claimed by the defendant for the term required by the Prescription Act (2 & 3 Wm. 4, c. 71), s. 2. There was no doubt that the right had been exercised at intervals for the thirty years next before the action, but it is contended by the plaintiff that the fact that during part of the thirty years the defendant had no occasion to and did not exercise the right, made the period of enjoyment insufficient. But this reasoning does not apply to an easement like that of using a way for the purpose of removing timber, the enjoyment of which is in its nature intermittent. It is true that upon the construction of the words "actually enjoyed for the full period of twenty

years" in s. 2, it has been held that actual user during the last year must be shewn: *Parker* v. *Mitchell* (1); and it is suggested rather than decided that there must be actual user during the first year: *Bailey* v. *Appleyard* (2); *Lowe* v. *Carpenter*. (3) But *Carr* v. *Foster* (4) shews that as to the intervening period it is not necessary to shew an act of user in each and every year between the first and last, and in *Earl de la Warr* v. *Miles* (5), James, L.J., treats the point as being still open.

[MANISTY, J. What was the starting point of the twenty years' enjoyment on which you rely?]

The fact that before the commencement of the twenty years the defendant used the way whenever he had occasion to do so is enough.

J. W. Mellor, Q.C. (*E. W. Garrett*, with him), in support of the rule. The Prescription Act contemplates a continuous user, and has no application to an easement which can only be enjoyed at intervals of several years: *Lowe* v. *Carpenter* (6).

[He was stopped.]

LORD COLERIDGE, C.J. I am of opinion that judgment should be entered for the plaintiff. The question was whether the defendant had made out a right to an easement under 2 & 3 Wm. 4, c. 71, and it was necessary for him to shew that he had actually enjoyed it without interruption for the full period of twenty years. The easement was to carry along a way the wood which happened to be cut upon a particular slope near this way, and it appeared that the wood was cut from time to time at intervals which were not very clearly ascertained, the whole wood being cleared at three cuttings of three successive years. It was also proved that the last exercise of this supposed right, which led to the action, was within the proper period, that is to say, just before the commencement of the action, and that the last previous cutting of the wood had been fifteen years before that, and within the twenty years. The cutting previous to that had been more than twenty years before action, and so could not be included in the twenty years' enjoyment.

(1) 11 Ad. & E. 788.
(2) 8 Ad. & E. 161, and p. 778, note.
(3) 6 Ex. 825.
(4) 3 Q. B. 581.
(5) 17 Ch. D. 535.
(6) Per Parke, B., 6 Ex. 825, at p. 827.

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Now it was argued for the defendant that although the right had not been actually enjoyed or used for the prescribed period, yet it might subsist without being actually exercised, and if it had been exercised from time to time partly before and partly after the period of twenty years had begun to run, that this would be a sufficient enjoyment to satisfy the statute. I am of opinion, however, that this contention cannot be supported, and that the words of the Act must be complied with, and there must be "actual enjoyment" (that is, real physical, positive enjoyment of the right claimed) without interruption, for the full period of twenty years. The result of this conclusion will be, to apply to the particular kind of easement which is claimed, the words of Parke, B., in *Lowe* v. *Carpenter* (1), and to say that if the words of the statute cannot be complied with, it shews that it does not affect this particular right. The right is, I apprehend, an easement capable of being claimed at common law if the evidence supports it, but from what I have said it does not appear to me to be an easement capable of being claimed under the Prescription Act. In the words of Parke, B., it seems to be one of those cases in which the statute cannot be taken to apply, "where the rights mentioned in it are used at intervals of two or three years, for in such cases a party could not acquiesce for one year under the 4th section of the Act 'if the act or matter' is done only at intervals of two or three years."

The decisions to which we have been referred in no way touch the present case. It has been decided in *Parker* v. *Mitchell* (2) and other cases that the first and the last year of the twenty years must be years during which, in order to obtain the right under the statute, there must have been actual enjoyment of the right claimed. In this case it is clear that that necessary incident to the acquirement of this right under the Prescription Act did not exist and could not have existed. Therefore it follows that, both on the authority of the cases and upon the true interpretation of the statute, as well as upon the authority of Parke, B., in expounding the statute, this is a kind of right to which Lord Tenterden's Act does not apply, although it may be claimed and can be claimed, and made out at common

(1) 6 Ex. 825. (2) 11 Ad. & E. 788.

law if there is evidence to support it. It must be observed that in construing a statute of this kind which creates a right, it must be clearly shewn that the right claimed comes within the very words of the statute creating it. This right does not come within the words of the statute, and therefore the right is not created by the statute.

Then as to the form of our judgment, we are given to understand that the plaintiff is content to have the verdict entered for him without damages, so as merely to settle the question of the right of way. The question arises, What ought to be done? We have the whole of the facts before us. The judgment is one which really results from our application of the law to the right claimed under the Prescription Act, and this being the only defence put forward, and it being clear, as we think, that the Act of Parliament does not allow it, there is in truth no defence to this action, and we are warranted under the Judicature Acts, having all the matters before us, in giving judgment for the plaintiff, damages forty shillings.

DENMAN, J. I am of the same opinion. I think it is clearly established that in order to bring a case within the section of the Act which has been relied on by the defendant, there must be proof of an actual enjoyment and exercise of the right claimed during the first of the twenty years which are material. In the present case this is not only not established but is clearly disproved, for during the first year, according to the evidence on both sides, this way was never used. And it is evident, from the very nature of the claim itself, it being a claim only to use the way at certain periods, that it comes within the description of Parke, B., in *Lowe* v. *Carpenter* (1), to which my Lord has referred, and it is a claim, therefore, to which the Act is not applicable at all.

MANISTY, J. I am of the same opinion. The 2nd, 4th, and 6th sections of the Act must be looked to, and, as my Lord has pointed out, the 2nd section only gives this statutory as distinguished from the common law right, "where the matter last before mentioned shall have been actually enjoyed for the full

(1) 6 Ex. 825.

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period of twenty years." Now that has been held to be the twenty years next before the action, and then, by the 6th section, "no presumption is to be made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period or number of years than the period mentioned in the Act." It may be taken that this action was brought in 1882. There is no suggestion, and there is not any evidence of the alleged right having been exercised in the first of the twenty years prescribed by the Act, or for some years either on one side or other of this term. The observations which have been made as to twenty years, apply equally to forty years, because this right is, by the pleadings, said to be founded on twenty or forty years' enjoyment. Now, if this be so, you have no starting point at which the right was exercised which would bring it within the Act, and upon that other ground I think we may decide this question. It is not necessary to say whether *Carr* v. *Foster* (1) was rightly decided or not. There is no doubt that Parke, B., intimated a sort of doubt whether a user every year ought not to be shewn, but *Carr* v. *Foster* (1) stands at present as an authority which has not, I believe, ever been overruled. Moreover, there seems to be very good sense in substance in the ground upon which it was decided. There, during the first year and for several years after, and in the last year, there had been actual enjoyment, but during the twenty years, not being the first or the last year, there was a time during which the commoner had no commonable cattle, and had not exercised the right, and it was held that there was evidence to go to the jury that the right had been exercised, although there had been no actual exercise of that right during the two years which elapsed while the commoner had no cattle, and I, for one, am far from thinking that that case was not well decided. But it is quite unnecessary to say whether it was or not. The defendant is really bound to contend that one exercise of the right during one of the occasions when the wood was cut, might constitute a sufficient twenty years' enjoyment within the Act, for the period for cutting the wood might only have occurred once during the twenty years. That cannot be sufficient evidence to go to the jury that a right was

(1) 3 Q. B. 581.

actually enjoyed for twenty years next before the commencement of the action. We have all the materials necessary for the consideration of the case before us, and I think the verdict should be entered for the plaintiff.

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Judgment for the plaintiff.

Solicitors for plaintiff: *Field, Roscoe, & Co.*
Solicitors for defendant: *Geare, Son, & Peace.*

A. P. S.

THE QUEEN ON THE PROSECUTION OF THE ASSESSMENT COMMITTEE OF THE POPLAR UNION, RESPONDENTS; THE EAST AND WEST INDIA DOCKS COMPANY, APPELLANTS.

July 19, 23.

Poor-rate—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *ss.* 46, 47—*Supplemental Valuation List, Omission from—Alterations during preceding twelve months—Diminution of Income—Evidence.*

In an appeal against a supplemental valuation list under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), whether that appeal be under s. 46 or s. 47, evidence is admissible only of an alteration in value occurring during the twelve months preceding the making of such list, and it is not competent to the appellant to open up the previous quinquennial or supplemental list by giving evidence of alterations antecedent to the period of twelve months before the making of the list appealed against.

Evidence of a diminution of income in the twelve months preceding the making of the supplemental list, though both admissible and relevant, is not sufficient to shew an alteration in value during that period within the meaning of ss. 46, 47.

CASE stated by the Court of General Assessment Sessions under the Valuation (Metropolis) Act, 1869, on an appeal against the supplemental valuation list of the parish of All Saints, Poplar, made under the provisions of the above Act.

The facts were, so far as material, as follows:—

At the quinquennial valuation made in 1875 the gross and rateable values of the hereditaments of the East and West India Docks Company lying in the parish of All Saints, Poplar, were fixed at 127,776*l.* and 91,896*l.*, respectively, which values were duly entered in the quinquennial valuation list for that year.

At the quinquennial valuation made in 1880 the company

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were assessed at the same values and did not appeal against the assessment.

In 1881 a supplemental valuation list within the meaning of s. 46 of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67) (1), was made by the overseers of the parish. They did not include the hereditaments of the company in this list, nor was any objection thereto, or any application to be inserted therein, made by the company.

On the 27th of May, 1882, the company served a notice on the overseers requiring them to make and deposit a supplemental valuation list shewing the alterations which had taken place within the preceding twelve months in the gross and rateable value of the hereditaments of the company.

On the 1st of June, 1882, the overseers made and deposited a supplemental valuation list, but did not include therein any of

(1) 32 & 33 Vict. c. 67, which makes provision for valuation lists in the metropolis.

By s. 43, the valuation list as approved by the assessment committee, shall come into force at the beginning of the year (commencing on the 6th of April) succeeding that in which it is made, and shall last for five years, subject to any alterations that may be made by any supplemental or provisional list as hereinafter mentioned.

Sect. 46. Every valuation list shall be revised in manner directed by this Act, and such revision in every period of five years shall be conducted as follows:—

(1.) In each of the first four years of such period a supplemental list shall, if necessary, be made out in the same form as the valuation list, and shall shew all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list, but shall contain only the hereditaments affected by such alterations.

(2.) In the fifth year of every such period the overseers shall make a new valuation list.

Sect. 47. If in the course of any year the value of any hereditament is increased by the addition thereto or the erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect:—

(1.) The overseers of the parish in which such hereditament is situate may, and on the written requisition of . . . . . any ratepayer of the union . . . . . shall, send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament.

(4.) An objection may be made to any such provisional list by the occupier . . . . by notice in writing being served on the clerk of the assessment committee . . . . .

(6.) The committee shall hear and determine on the objection in the same manner as if it were an objection to a valuation list, and may make such order as they think just.

the hereditaments of the company or the gross or rateable value thereof.

On the 24th of June, 1882, the company served on the clerk of the assessment committee of the Poplar Union and on the overseers a notice that they were aggrieved at the omission, and desired that the list should be corrected by the insertion therein of their hereditaments at an assessment of 70,067*l.* gross, and 50,391*l.* rateable value, or thereabouts.

On the 29th of September, 1882, the assessment committee heard counsel for the company in support of their objection and requirements. With a view of proving that there had been an alteration within the meaning of s. 46 of the Valuation (Metropolis) Act, 1869, entitling the company to a revision of the valuation list, they tendered in evidence the books and balance-sheets of the company from 1874 to 1881 inclusive, and offered to verify, by the testimony of witnesses, the facts and figures therein contained, and contended that the said books and balance-sheets shewed that there had been a continuous and considerable decline in the profits of the company extending over the said several years down to and including 1881, and that an important portion of such diminution had occurred during the preceding twelve months. No other evidence was tendered.

The assessment committee declined to insert the property of the company in the supplemental valuation list, on the ground that no alteration had been made in the value of such property as was contemplated by the Valuation (Metropolis) Act, 1869.

On appeal to the court of assessment sessions no further evidence was, by agreement between the parties, tendered on either side, but the opinion of the sessions was asked upon the following questions:—

(1.) Whether the evidence tendered to the assessment committee, or any and what part thereof, was relevant and admissible?

(2.) If any was relevant and admissible, whether such relevant and admissible evidence tendered, if proved, was sufficient to establish an alteration within the meaning of s. 46?

(3.) Whether, assuming an alteration within the twelve months established, the company was therefore entitled to have the

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present actual value ascertained and inserted in the supplemental list, or only to have the values standing in the valuation list reduced by the amount of the alteration in value, if any, occurring within the preceding twelve months, and to have such altered values inserted in the supplemental list?

The company duly applied to the justices in assessment sessions to direct a valuation of their said hereditaments under s. 36 of the Valuation (Metropolis) Act, 1869.

It was contended for the company that the whole of the evidence so tendered was relevant and admissible, and that such evidence if proved was sufficient to establish and did establish that an alteration had taken place within the preceding twelve months within the meaning of s. 46 of the said Act, and that it being thus established that an alteration had taken place, the company were entitled to have the hereditaments valued at the present actual value and such value entered in the supplemental list. It was further contended in the alternative that the company were, at all events, entitled to a reduction in the valuation list in respect of the diminution of profits occurring during the preceding twelve months.

The assessment committee contended that the company were concluded by the quinquennial valuation made in 1880 as to the value of the hereditaments at that date, and also by the supplemental list of 1881 as to no alterations having occurred in the value in the twelve months to which the said supplemental list referred, and that the company could not go behind either of the said lists, and that the evidence as to a falling-off in the years 1875 to 1881 was consequently irrelevant and inadmissible, and that none of the evidence tendered was relevant and admissible, or (if any) only such (if any) as shewed a falling-off within the preceding twelve months between April, 1881, and April, 1882, and that such last-mentioned evidence was not nor was the whole of the evidence tendered (even if relevant and admissible) sufficient to establish an alteration within the said preceding twelve months within the meaning of s. 46 of the said Act, and that, even if the said evidence did establish an alteration within the said twelve months, the company were not therefore entitled to have the said hereditaments valued and their present actual

value entered in the supplemental list, but only to have the values reduced by the amount of the alteration in value (if any) occurring within the preceding twelve months.

The court of assessment sessions decided that the whole of the evidence mentioned in the case and tendered to the assessment committee was relevant and admissible, and that such evidence if proved was sufficient to establish an alteration within the meaning of s. 46 of the said Act, and that the company were entitled to have the hereditaments valued at their present actual value, and such value entered in the supplemental list, and not merely any alteration in value which might have taken place during the preceding twelve months; and the Court ordered that the supplemental list be altered by the insertion therein of the hereditaments of the dock company, and directed a valuation of the same to be made upon the principles of their decision.

The point of law reserved for the opinion of the Court was, whether the said decision and order of the court of assessment sessions, or any and what part thereof was good.

The company's balance-sheets, which were annexed to and formed part of the case, shewed the following amounts of net profits in the years mentioned—1874, 145,756*l.*; 1875, 142,187*l.*; 1876, 143,245*l.*; 1877, 119,741*l.*; 1878, 140,846*l.*; 1879, 144,312*l.*; 1880, 111,466*l.*; 1881, 71,000*l.*

There was also a case stated on appeal as to the supplemental list for the parish of Bromley, St. Leonards, in which a portion of the property of the East and West India Docks Company is situated, which raised the same points as those in the present case.

Sir F. Herschell, S.G., *Hall, Q.C.*, and *Fullarton*, for the respondents. First: The scheme of the Act is that there shall be a new valuation every five years, and the effect of the order of sessions is to destroy that quinquennial valuation. The appellants are bound by the values in the quinquennial valuation list of 1880, which was unaltered by the supplemental list of 1881. They are entitled only to shew a decrease in the value of the property in the twelve months preceding the making of the supplemental list in 1882; they cannot shew that the values in

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the valuation list of 1880 were wrong; those values must be taken as the basis for the whole quinquennium.

Secondly: The alteration that must be shewn must be an increase or reduction arising from some definite cause, either affecting the structure or its relation to other structures, or some change in the condition of things which has caused it to be increased or reduced in value. Mere diminution of receipts in any particular year is no evidence of a diminution in value of the hereditaments. *Reg.* v. *New River Co.* (1), on which the appellants relied at quarter sessions, is not in point; that was really a case of structural alteration. By s. 4 "gross value" is defined as "the annual rent which the tenant might reasonably be expected, taking one year with another, to pay for an hereditament;" a mere temporary fluctuation is therefore not to be taken into consideration.

Sir H. S. Giffard, Q.C., *Marriott, Q.C.*, and *Kenelm Digby*, for the appellants. The evidence was both admissible and relevant. Diminution of profit is an element to be considered in ascertaining the rateable value of a property; and the value is what a hypothetical tenant would give for its occupation in the preceding year: *Reg.* v. *Abney Park Cemetery Co.* (2) If an alteration in circumstances during the twelve months preceding the supplemental list be shewn, then the quinquennial valuation is no longer binding, and what has to be found is—not any fictitious value, but—the true and actual rateable value for that twelve months. The alteration in receipts is the result of the alteration in circumstances, and a continually diminishing profit shews in the clearest manner the diminished value of the property, as tested by the diminished rent which would be given by the hypothetical tenant. The ejusdem generis rule of construction is not applicable to the words "from any cause" in s. 47 of the Act, and it is unnecessary to shew a structural alteration, as was previously the case under s. 25 of the Union Assessment Act, 1862 (25 & 26 Vict. c. 103), the terms of which were more restricted.

GROVE, J. I am of opinion that the assessment committee

(1) 4 Q. B. D. 309. (2) Law Rep. 8 Q. B. 515.

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were right, and that the dock company are not entitled to have their assessment reduced in the way for which they contend; and, further, that the evidence given, although to a certain extent relevant and admissible, was not sufficient to entitle the assessment committee to adopt the mode of valuation which the appellants contend is the proper mode within the meaning of the Metropolis (Valuation) Act, 1869.

The question turns upon the construction of two sections of that Act. Possibly, indeed, only the 47th section applies to this particular case, for s. 46 applies to a supplemental list which, as far as I can gather from the Act, it is not obligatory to make out upon the application of any ratepayer of the union, whereas s. 47 seems to apply to a list which it is obligatory to make out on the application of the party affected; that point, however, has not been argued, and does not seem to be material to the decision of the present case. The question which has been raised before us is really whether, when a quinquennial valuation has been made, and when a supplemental valuation in any subsequent year has to be made, you can go behind the particular year and reopen and go into the valuation for the years intervening between the quinquennial valuation and that time, or whether you can go back altogether and shew the actual value of the property within the meaning of the Act,—I mean to the hypothetical tenants, its value communibus annis,—or whether you can only go back to the preceding year. I do not say that there is no difficulty in the case, for there are difficulties in the way of both sides, and we must endeavour to ascertain as far as possible the meaning and intention of the Act from its language. The argument of Sir H. Giffard seems to ignore two important provisions in this Act, and I do not think he met the difficulties which arose on the words of ss. 46 and 47. He argued from the alteration in the wording of s. 47 of this Act when compared with s. 25 of the Union Assessment Act, 1862 (which may be called the same section with reference to the then state of things) that a very different construction was to be put on those two sections. The language used in s. 25 of the Act of 1862 is, as he rightly said, narrower than that used in s. 47 of the later Act, and the words "or

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otherwise" in the former are more proper to be construed in what I may call the ejusdem generis sense than the words "from any cause" in the latter enactment. But though the words in the later are undoubtedly wider than those in the earlier Act, I do not think they are so wide as Sir Hardinge Giffard contended; for he argued that it was enough to shew that the premises were increased or reduced in value without regard to the cause of the increase or reduction. I do not read the section in that way, and for this reason, among others, that if the Act had intended to say that, it would simply have said, "If in the course of any year the value of any hereditament is increased or reduced," which would be all that the appellants require; such an interpretation is not, I think, fairly within the meaning of the words as they stand, nor, on a comparison with s. 46, does it appear to be what the Act intended. Why should the words, "if in the course of any year," shewing that it is confined to a particular year, otherwise there would be no object in using these words, "the value of any hereditaments be increased by the addition thereto or erection thereon of any building" be put in? Does it not shew that there must be some cause, something which is to satisfy an assessment committee, or an arbitrator, or a jury, or whatever may be the tribunal, that something has been done, added, or subtracted, or some alteration made within a particular year to which the section applies? And turning to s. 46, which deals with the making of the supplemental list, we find that that list is to shew "all the alterations which have taken place during the preceding twelve months in any of the matters stated in the valuation list." It appears to me that the argument for the dock company in this case wholly ignores those words. What meaning are we to give to them? According to the appellants' contention any alterations during the preceding four years, provided there had been an alteration within the last year, could be inquired into; and indeed I do not see how you could avoid going even beyond the last quinquennial valuation, if you are to take the real actual value of the premises, so that you may shew that the quinquennial valuation is wrong, and that neither before nor since that period have the premises been of the value at which they are put down; this would make the quinquennial

valuation a mere useless proceeding. If this was the intention of the legislature, the statute, instead of using the words, "shewing the alterations which have taken place during the preceding twelve months," should have said "shewing any mistake which may have been made in the quinquennial valuation, and shewing the real value of the premises to a tenant communibus annis." I cannot ignore the words "during the preceding twelve months" in s. 46, or the words "if in the course of any year the value of any hereditaments is increased or reduced" in s. 47. It appears to me that they mean the same thing. I agree with Mr. Marriott's argument in part, that the fixing of that period of five years was to prevent the old valuations remaining when great changes have taken place in the value of premises, and to keep the valuation fairly up to the existing period; it would have been a costly and troublesome process to have valued them every year, and it was thought that five years was a fair time for a general re-valuation. A quinquennial valuation would be little more than a matter of form if it had to be gone into de novo every year during a quinquennium, and it would give no rational meaning to the words in ss. 46 and 47, which I have already quoted. Those words I cannot ignore; they appear to me to be essential, and to have a very intelligible meaning, namely, you shall take the quinquennial valuation and take that as your basis, but if you can shew that there has been a change between that period and the next, or any of the four following years, you have a right to have the premises assessed according to that change. On the one hand, if they have increased in value, the parish will take care to have the assessment altered; if, on the other hand, they have been reduced in value, the ratepayer will do so. I do not say that the mode of computation may not be a difficult one; that is a matter with which we are not asked to deal.

What was done in the present case? The counsel for the docks company tendered in evidence the balance-sheets from 1874 to 1881, and offered to verify them by the evidence of witnesses, with a view to shew that there had been a continuous diminution in the profits during those years, of which an important portion had occurred during the preceding twelve

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months, and that there had been an alteration within the meaning of s. 46. No other evidence was tendered. It is stated in another part of the case that that was by agreement. Therefore it was not as if the appellants could have tendered other evidence, but did not; it was agreed that that evidence should be taken as a test of the contention on each side. One question left to us is—is that evidence admissible, and is it relevant? I think that with regard to the last year, the preceding twelve months, it is both admissible and relevant; but I do not think it is sufficient. It is necessary to shew two things: diminution in value within the meaning of the Act, which is, as I said before, the value to the tenant "communibus annis," and it is necessary within ss. 46 and 47 to shew that that diminution is attributable to something which has occurred or taken effect since the quinquennial valuation; in other words, to shew an alteration in circumstances. What circumstances may be sufficient it is unnecessary for me to consider. I do not think they are confined to alterations ejusdem generis with structural alterations, such as an addition to, or an erection of a building on, the hereditaments; but how far they may extend it would be impossible to say. Each case must depend upon itself, but I think that some alteration of circumstances must be shewn, something which was not in existence, or had not produced any effect upon the premises at the quinquennial valuation, but which had taken place during the preceding twelve months. It may be that the root or cause of the alteration dated further back than the quinquennial valuation, but that the effect was not perceptible within the twelve months; but it is unnecessary to consider that point in the present case; there must be some cause making the basis of the valuation different from that at the time of the quinquennial valuation. It being therefore necessary to shew this alteration in value, I think that a mere diminution of profits, though admissible and relevant, is not sufficient; the mere fact that the appellants had received less money during one year than during the preceding one would not prove the necessary alteration. That might be a mere accidental fluctuation in the business due to some adventitious cause having nothing

to do with the value of the premises, and therefore insufficient to shew a permanent alteration within the only period during which, in my opinion, the alteration must take place, that is, within the twelve months preceding the making of the supplemental list. Therefore, on that question I am of opinion that the evidence tendered, though partly admissible and relevant, was insufficient to establish an alteration within the meaning of ss. 46 and 47. And, secondly, with regard to the opinion of the sessions, that the appellants are entitled to have the hereditaments valued at their present actual value, and such value entered in the supplemental list, and not merely any alteration in value which may have taken place during the preceding twelve months, I answer in the negative, that they are not so entitled, but that all that can be entered in the supplemental list is any alteration that may have taken place during the preceding twelve months. My judgment therefore, which will also govern the second appeal, is in favour of the respondents.

MANISTY, J. I am of the same opinion. The Act of 1869 seems to me to be well drawn, and I agree with the observation of Cockburn, C.J., in *Reg.* v. *New River Co.* (1), that it is more accurate and intelligible than most of the Acts that we have to deal with, and, adhering to the plain and popular language in which this statute is drawn, I have no difficulty in interpreting it.

No doubt the Act of 1862 has some bearing upon that of 1869, but there is no serious difference between them so as to lead me to put upon the later Act a different construction to that which I should have put upon it if the earlier statute had never been passed. The scheme of the former Act was, of course, somewhat different, and the language sometimes difficult to deal with; for instance, it was necessary to put a very large construction upon the definition of gross estimated rental in s. 15; but this has been rectified in the Act of 1869, in which gross value means—not the rent at which it may be let from year to year, but—the rent which a tenant might be reasonably expected to pay, taking one year with another, which is the fundamental principle on

(1) 4 Q. B. D. 309.

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which our judgment proceeds. Then the provisions with regard to the quinquennial valuation are careful and clear. Throughout the Act there are three things distinctly mentioned, and they are, in form at all events, and somewhat also in substance, different things. First, there is the quinquennial valuation list, which by s. 45 is to be conclusive evidence of the gross and rateable values of the hereditaments, subject to the provisions afterwards mentioned. What are these provisions? The first is the supplemental list mentioned in s. 46, and I may here say that I think that in bringing this appeal under that section the appeal has been misconceived in point of form, and that it is in substance a proceeding under s. 47. An appeal may be brought against the supplemental list, but, strange to say, the form in which the present appeal came before the sessions was an objection to an omission from the supplemental list, for which there is no appeal provided. That list is to shew all the alterations that have taken place during the preceding twelve months, and it is subject to all the forms "and the same proceedings shall be had in the case of a supplemental and a new (i.e. quinquennial) valuation list as are directed by this Act," &c. Everything in s. 46 points to the appeal being one against alterations made by the overseers.

Then by s. 47, if in the course of any year the value of any hereditament is from any cause increased or reduced in value, the overseers may, and upon a requisition being made to them by the assessment committee, or by a ratepayer, or by the surveyor of taxes, shall, "send to the assessment committee a provisional list, containing the gross and rateable value as so increased or reduced of such hereditament." What was done in the present case? The dock company not only gave notice that they were aggrieved by the omission from the supplemental list, but further desired that list to be corrected by the insertion therein of the said hereditaments with an assessment at 70,067*l.* gross and 50,391*l.* rateable value; so that in substance they really did resort to s. 47. The overseers are then to send to the assessment committee a provisional list containing the gross and rateable value so increased or reduced, and if they make default

the committee are to appoint a person to make out such list. On receipt of the provisional list the assessment committee hear and determine all objections, and then by s. 47, sub-s. 8, the list is to have operation from the date of the service, and is to continue until the first list (supplemental or other), which is subsequently made, comes into force. And by sub-s. 9, entries are to be made in the rate-book so as to bring it into conformity with the provisional list. There are therefore three sets of provisions distinctly applicable to three different lists.

On this appeal, which, though in form an appeal against an omission from the list, was in substance an appeal upon the requisition of the ratepayer to have the value reduced, what took place was this: evidence was laid before the quarter sessions, and I presume also before the assessment committee, with regard to the income of the company for several years, and not confined to any alteration in value during the preceding twelve months. It seems to me that the sessions were wrong in receiving evidence applicable to all these years, but that evidence was admissible with the view of shewing an alteration during the preceding twelve months, that is, the year 1881. Indeed, if the balance-sheets be looked at, it will be seen that the expenditure during these years varies very much, and that fact alone shews the fallacy of applying evidence of diminished receipts within that period to a case like this; perhaps the company increased their works, or other things occurred which caused additional expenditure during certain years. But then what the assessment committee have to determine is the difference in the rateable value or rather the difference in the rent which a tenant would give for the property "communibus annis," and not for one year only, and it would be the most loose and fallacious method to take the mere profits in 1880, 1881, and 1882, and say that that is the basis upon which you are to increase or reduce the assessment. Assuming a decrease of ten or twenty thousand pounds in the profits of any year, to my mind it would be utterly wrong to say that this sum is to be deducted from the amount of the preceding quinquennial valuation, or from anything at all; what has to be determined is how that alteration, if it be an alteration, would affect the letting value,

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taking one year with another, good and bad together. It might be that a large sum of money had been expended on the property that year which would not diminish the letting value at all, but rather increase it; so that in fact the very reduction of net profit would often increase the rateable value of the property. The cause of the diminished income must be inquired into, and if that cause goes actually to increase the value, though it may not increase the income, that is what the assessment committee have to inquire into. I do not think that the principle upon which the sessions acted in making a deduction merely in respect of diminished income was the true principle upon which they ought to have acted, but I am clearly of opinion that they were quite wrong in admitting evidence relating to previous years, for by so doing they simply ignore the very words of the statute; they are bound, whether the proceedings be under s. 46 or s. 47, to see what the alteration, if any, was in the preceding twelve months, and to determine the consequence of such alteration upon the letting value, which is the gross value, of the property. The evidence submitted to them was by no means sufficient to justify their conclusion, and the principle upon which the sessions acted being a wrong one, I answer the question put to us in the negative.

Order of sessions quashed.

Solicitors for appellants: *Freshfields & Williams.*
Solicitors for respondents: *J. W. Marsh.*

J. R.

[IN THE COURT OF APPEAL.]

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May 30.

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Local Government Acts — Compensation — Procedure — Time for determining Liability and Compensation—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 179, 180, 308.

The defendants by altering a roadway under the powers of the Public Health Act, 1875, injured the access to the plaintiff's house. He thereupon claimed compensation from the defendants, and appointed an arbitrator. The defendants did not appoint an arbitrator, and thereupon the arbitrator appointed by the plaintiff awarded to him a certain sum as compensation for the injury done to his house. The defendants not having paid this amount, an action was brought to recover it, in which the liability of the defendants to compensate the plaintiff was established; but the defendants objected that the action would not lie, on the ground that the question of liability ought to have been decided before the amount of compensation was ascertained:—

Held, that the action was maintainable, and that the plaintiff was entitled to judgment.

Affirmed by H. of L. 1884, 9 App. Cas. 73.

The statement of claim alleged in substance that the defendants were the Urban Sanitary Authority of Brierley Hill, and exercised the powers of the Public Health Act, 1875, throughout their urban sanitary district: that in June, 1881, the plaintiff purchased a messuage and premises in High Street, Brierley Hill, within the urban sanitary district of the defendants: that the defendants in pursuance of the powers conferred upon them by the Public Health Act, 1875, s. 149, commenced to pave the High Street, and to raise the soil of and to alter the said street, and in the beginning of October the defendants raised the soil of the said street in front of the messuage and premises of the plaintiff to the distance of three feet, and otherwise altered the said street: that the plaintiff sustained damage by reason of the defendants raising and altering the said street, and a dispute arose between the plaintiff and the defendants as to the fact of the damage sustained, and the amount of compensation to be awarded to the plaintiff in respect thereof: that on the 30th of December, 1881, the plaintiff duly and in accordance with the powers of 38 & 39 Vict. c. 55, appointed J. L. Warren as his arbitrator to determine the amount of compensation to be paid

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to the plaintiff for the damage sustained, and the plaintiff gave due notice to the defendants of the appointment: that the defendants did not within fourteen days of the service of the notice upon them appoint any arbitrator, and J. L. Warren thereby became sole arbitrator: that the arbitrator took upon himself the reference, and published his award, and thereby awarded that the plaintiff was entitled to be paid by the defendants the sum of 234*l.* 10*s.* 8*d.* as full compensation, and directed the defendants to pay all the costs, amounting, when taxed, to 152*l.* 0*s.* 3*d.* The plaintiff claimed 386*l.* 10*s.* 11*d.*

The statement of defence alleged, amongst other matters, that if any damage had been sustained by the plaintiff, the same was caused by the defendants as surveyors of highways restoring the roadway of High Street, which had become dangerous and unsafe through mining operations: that the plaintiff had claimed compensation, but did not claim any amount or sum of money: that the defendants denied the title of the plaintiff to the property claimed by him, and that they were liable to make any compensation.

The action came on for trial before Bowen, L.J., without a jury at the summer assizes held in August, 1882, at Gloucester, when the case was adjourned for further consideration. It was objected that the plaintiff's notice of claim for compensation did not specify any amount. Ultimately, on the 5th of December, 1882, the Lord Justice delivered the following judgment:—

BOWEN, L.J. The defendants in this case have based their defence to the plaintiff's claim upon three grounds. In the first place, they have insisted that the alterations of which the plaintiff complains are not alterations effected by them under the powers conferred upon them by the Public Health Act, 1875, but were nothing more than a restoration to its former level of an ancient highway, which they were legally justified in effecting under their powers of surveyors of highways. This raises an issue of fact on which the evidence before me is conflicting. Nearly forty years ago there had unquestionably been a subsidence of the plaintiff's house and the roadway and path. A

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restoration of the roadway to some extent took place not long afterwards, but the extent of the restoration is a matter of dispute between the parties, the defendants contending that the pathway outside the plaintiff's house had never in fact been restored to its original level, and that the defendants were now only relaying it at the level which they were entitled to do. The burden of proof upon this portion of the case rests upon, I think, the defendants; they have failed to satisfy me that what has been really done under the resolution of the board is simply the restoration of the level of the old highway, but I find as a fact that what has been done has not been the restoration of the old road but an act done by the local board under the Public Health Act, and I decide accordingly the issues affecting this part of the defence for the plaintiff.

There remains however to be considered the serious objection of law raised on the part of the defendants, which if made good goes to the root of the plaintiff's claim. This is an action upon an award of an arbitrator professing to act under ss. 179 and 180 of the Public Health Act, 1875. The arbitrator was appointed by the plaintiff upon the 30th of December, 1881, and a notice in writing was given of his appointment to the defendants. As the defendants did not on their side name another arbitrator, the plaintiff's arbitrator, purporting to act under sub-s. 4 of s. 180, proceeded with the arbitration, the defendants appearing under protest, and in the result an award was made in favour of the plaintiff for the sum of 234*l.*, to recover which sum this action is now brought. It was contended before me that the arbitration was wholly invalid, upon the ground that the arbitration sections of the Public Health Act, 179, 180 and 308, can only be invoked by the claimant when his dispute is one as to the amount of compensation to be awarded, or the fact of damage having been sustained, and as from the outset there has been in this case a bonâ fide dispute between the plaintiff and the board as to the legal liability of the board, the plaintiff has prematurely resorted to the arbitration sections, and it is true that the dispute on the 30th of December, 1881, and since that date, down to the present time, has been one not of amount only, but also as to legal liability. The question I have to decide is whether this

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fact renders the whole proceedings before the arbitrator ultra vires and of no effect. Reliance is placed upon the defendants' part upon the authority of the case of *Reg.* v. *Metropolitan Commissioners of Sewers* (1), decided in the year 1853. This was a case decided under 11 & 12 Vict. c. 112, and ss. 69 and 70, which, though not in identical language with the present Act, nevertheless contain so nearly similar language as to afford some elucidation as to the point under discussion. It is provided by the former of these two sections (69), that the commissioners should make full compensation for any damage sustained by the exercise of any of the powers of the Act, and that in case of dispute as to the amount of the same, it is to be settled by arbitration. By the latter of the sections (70), it is enacted in case of dispute as to the amount of any compensation, that one of the two parties might appoint an arbitrator, and that if the other party failed to appoint an arbitrator, the arbitrator appointed by the other might make an ex parte award. The plaintiffs sought in that case to enforce by mandamus an award made ex parte against the commissioners, but it appearing that the commissioners had from the first disputed their liability to make any compensation on the ground that their contractors only were liable, the Court of Queen's Bench refused the plaintiff's application for a mandamus. In discharging the rule, Lord Campbell speaks as follows:—"It seems to me the mode of proceeding provided by those sections is expressly and anxiously confined to cases in which there is a dispute about the amount of compensation. The 69th section enacts that 'full compensation shall be made out of such rate to be levied under this Act, as the commissioners shall by their decree direct, to all persons sustaining any damage by reason of this Act,' and if the section had stopped there, the only remedy would have been either an action or a writ of mandamus. Those words clearly impose a duty upon the commissioners to make compensation, and say nothing as to any specific remedy, and clearly the only remedy would have been an action or a mandamus. Then do the other words in the section embrace the question of liability? It seems to me they are confined to the simple case of a dispute as to the quantum of damage, 'and in case

(1) 22 L. J. (Q.B.) 234. 1 R. & C. 494

of dispute as to amount, the same shall be settled by arbitration in the manner provided by this Act.' It is only in case of a dispute as to amount that the remedy by arbitration is given, and in other respects the party is left in the same situation as if nothing were said about arbitration. That is the construction according to the plain natural and grammatical sense of the words, and if it led to any absurdity, rather than impute that to the Legislature the Court would be led to strain the language used; but it seems to me the Legislature intended what is quite reasonable, that if there was a question of liability it should be tried by the Superior Courts, but if of amount only, then as that was a matter which an arbitrator could settle more satisfactorily than a Court and jury, in that case, and that only, the mode pointed out in the 69th and 70th sections should be adopted." Similar language was used by Wightman, J. He says: "I am of the same opinion. It is safer to rely upon the terms of this Act without referring to those contained in other Acts. The latter part of the 69th section is confined in terms to cases of dispute as to amount, and here the dispute is as to general liability, which gives rise to very different questions and is left to be determined by the ordinary course of proceeding." And Mr. Justice, afterwards Lord Chief Justice, Erle, says: "The jurisdiction is created under s. 69, and that section, I agree, gives it only where the dispute is confined to amount, and the jurisdiction does not apply to cases where the liability to make any compensation at all is to be tried." The next case which was relied upon by the defendants was that of *Reg.* v. *Burslem Local Board* (1), which came before the Court of Queen's Bench twice, and finally before the Exchequer Chamber. It arose under 11 & 12 Vict. c. 63, s. 144. A writ of mandamus had been directed to the Burslem Board of Health, directing them to cause compensation to be made out of the general or special district rate to the prosecutor for the damage sustained by him by reason of the exercise of the powers given to the defendants. The writ recited that the defendants denied all liability to make such compensation, an allegation which was traversed by the return. The judgment of the demurrer to the return (2) was given, but it is not necessary to consider this

(1) 28 L. J. (Q.B.) 345; 29 L. J. (Q.B.) 242. (2) 29 L. J. (Q.B.) 21.

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judgment with reference to the present point, and I only allude to it as part of the narrative of the case. Therefore the issue of fact raised on the return went down to be tried at Nisi Prius, and on the trial it was found that the defendants had always denied their liability to make compensation. It did not appear upon the return—and this is important—that there was any dispute as to the amount. The Court of Queen's Bench refused to disturb the verdict which had been entered at the trial for the prosecutor. The defendants contended that the prosecutor had misconceived his remedy, and that he ought, instead of applying for a mandamus, to have proceeded under the arbitration section, but Lord Campbell, C.J., pointed out that the arbitrator would have had no jurisdiction unless there had been a dispute as to compensation. This decision was affirmed by the Exchequer Chamber. This case, however, although the language of the Court of Queen's Bench and Exchequer Chamber is worthy of attention, only decides, of course, that where there is at the outset no question of amount, but only a question of liability, the question of liability may be and probably ought to be settled first, before the arbitration clauses of the Public Health Act, 1848, are put in force.

The question which is raised in the present action is one in which both amount and liability were disputed; in which respect it differs from the case of *Reg.* v. *Burslem Local Board* (1) last referred to; but it remains to be considered whether it is governed by the view expressed by Lord Campbell, and acted upon in the case of *The Queen* v. *Metropolitan Commissioners of Sewers* (2), which was decided, no doubt, under a different Act of Parliament, that if there is a question of liability it should be tried by the Superior Court, but if of amount only, then the arbitration clauses were the proper remedy.

This case, I think, is binding upon me, if the Act of Parliament under which the present question arises does not differ from the Act, as respects the point now raised, under which the *Metropolitan Commissioners of Sewers' Case* (2) was decided. I proceed accordingly to consider what is the true meaning of the arbitra-

(1) 28 L. J. (Q.B.) 345; 29 L. J. (Q.B.) 242.
(2) 22 L. J. (Q.B.) 234.

tion sections in the Public Health Act, 1875. The first section is s. 308, which provides that "where any person sustains any damage by reason of the exercise of any of the powers of this Act in relation to any matter as to which he is not himself in default, full compensation shall be made to such person by the local authority exercising such powers, and any dispute as to the fact of damage or amount of compensation shall be settled by arbitration in manner provided by this Act, or if the compensation claimed does not exceed the sum of 20*l.*, the same may, at the option of either party, be ascertained by and be recovered before a Court of summary jurisdiction." It will be observed that this section is couched in language slightly wider than the language under which the case of the Metropolitan Commissioners of Sewers was decided. Arbitration is to be the mode of settling any dispute as to the amount of compensation or as to the fact of damage. I do not, however, think that in substance this alteration in language is material for the purposes of the case which I am now about to decide, because I do not find in this section any intention that questions of liability should in any event be submitted to an arbitrator.

I pass next to the arbitration clauses proper in the Act, and the first is s. 179, which directs, "in case of dispute as to the amount of any compensation to be made under the provisions of this Act (except where the mode of determining the same is specially provided for), and in case of any matter which by this Act is authorized or directed to be settled by arbitration, then, unless both parties concur in the appointment of a single arbitrator, each party shall appoint an arbitrator to whom the matter shall be referred." This applies to the procedure for the purposes of arbitration in the cases pointed out in s. 308. Now, it is plain that no provision, as I have said before, is made in this Act for referring the question of liability, but it is said on behalf of the plaintiff: "I did not and have never agreed to refer to the arbitrator the question of liability, there is a dispute as to damage, there is a dispute as to liability as well, and what I desire to do is, at the earliest moment to be able to invoke the arbitration clauses in spite of the fact that the question as to liability is outstanding, and I am not the less proceeding within my rights

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because I have allowed that question of liability to stand over to be decided after the award." I cannot think that this is the right construction of the section. It seems to me that, apart from the authority of the case of *The Queen* v. *Metropolitan Commissioners of Sewers* (1), which really I am unable substantially to distinguish from the present, convenience would lead one to believe that it was not the intention of the Public Health Act, 1875, to make so great a change as to allow of the claimant in the first instance to ride over, or, at all events, to postpone for a time, the decision and discussion of the question of liability with a view of proceeding under the arbitration clauses, upon the bare ground that there was a dispute as to the amount. Such a construction it seems to me would not only be attended by inconvenience but very probably with additional expense. I think the policy of the Legislature in these Acts, the Public Health Act of 1875, and the Acts I have alluded to under which the cases I have referred to have been decided, was different, and it was intended, not merely that the question of liability should be decided by a Superior Court, but that it should be decided at once. An illustration of the difficulty which would arise upon any different construction is presented by this very case. Here is a case in which the question arises whether the local authority has in restoring the road been acting under its powers as surveyors of highways, or under the Public Health Act itself; and that question must be determined according to the view which the tribunal appointed to decide the issues of fact should take of this further controversy, whether the alteration of the road which has been effected is, in fact, more, and to what extent it is more, than the restoration of the road to its original level. Now I have, in fact, decided that nothing has been done otherwise than under the Public Health Act of 1875; but I might, if the facts had enabled me to do so, and the facts in a case like the present must be more or less obscure, have decided that what the board had done was partly the restoration of the old road. But they have done more than restore the old road, and they have been obliged to fall back upon their powers under the Public Health Act, and as to the amount of damages, it seems to me

(1) 22 L. J. (Q.B.) 234.

the decision must depend on the exact amount of alteration that had been effected in the one way and the exact amount of alteration which had been effected in the other. How can an arbitrator, until the particular amount of liability has been decided, generally consider the question of what damage has been sustained under the Act? I mention this illustration, because I do not know that I could find a better one, if I were to travel through the region of imagination, than the one which has been presented in this case.

A third point was taken by the defendants as to the sufficiency of the claim which was presented by the claimant. It is not necessary for me to decide that case, or even to express an opinion. I am not convinced that there is anything in the point. I express no opinion. On the ground that the claimant in this case, the plaintiff, has invoked the arbitration clause of the Public Health Act too soon, I decide this case, as I think I am bound to do, against him. The judgment therefore, will be entered for the defendants; but as upon the issue of fact tried before me with reference to the restoration of the road the plaintiff has, in my opinion, succeeded, he will have the costs of all that part of the action which relates to that.

The plaintiff appealed.

May 29, 30. *Bosanquet, Q.C.* (*H. Matthews, Q.C.*, with him), for the plaintiff. Bowen, L.J., decided that the defendants were not liable in the present action, because there had been no determination of liability before the arbitration was held: he relied upon the authority of certain decisions, such as *Reg.* v. *Metropolitan Commissioners of Sewers* (1), and *Reg.* v. *Burslem Local Board of Health* (2); but it has now become a settled course of procedure under the Lands Clauses Consolidation Act, 1845, that the amount of compensation shall be first ascertained, and afterwards that an action shall be brought on the award or inquisition. It may be said that the proper mode of procedure is by mandamus to assess compensation; but at present a mandamus would not be granted

(1) 1 E. & B. 694; 22 L. J. (Q.B.) 234.

(2) 1 E. & E. 1077; 29 L. J. (Q.B.) 242.

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for that purpose: the procedure under the Public Health Acts has drifted into its present shape as it drifted under the Lands Clauses Consolidation Act, 1845. The present objection might have been properly raised and decided in *Burgess* v. *Northwich Local Board.* (1) The procedure adopted by the plaintiff is more convenient.

A. R. Jelf, Q.C., and *Anstie, Q.C.* (*Kettle*, with them), for the defendants. It may be admitted that the practice under the Lands Clauses Consolidation Act, 1845, is in favour of the argument for the plaintiff; but a result wholly at variance with that practice has been arrived at upon similar statutes. Moreover, if it is to be held that the language used by the Legislature is material, it must be observed that the terms of the Lands Clauses Consolidation Act, 1845, and of the Public Health Act, 1875, are different. Upon a balance of convenience and inconvenience it is less burdensome to decide the question of liability first, and the plaintiff cannot contend that an arbitrator has jurisdiction to entertain a question of title or liability.

[BRETT, M.R. The practice of obtaining an award of compensation in the first instance has grown out of the former practice at Nisi Prius, where the judge took the opinion of the jury as to the facts, and reserved the question of law for the Court.]

The argument for the defendants is supported by the decisions in *Reg.* v. *Metropolitan Commissioners of Sewers* (2), in *Bradby* v. *Southampton Local Board of Health* (3), and in *Reg.* v. *Burslem Local Board.* (4) The decision in *Bradford Local Board of Health* v. *Hopwood* (5) is at variance with the decisions in other cases. The decisions upon the Lands Clauses Consolidation Act, 1845, ought not to be treated as precedents for the procedure under the Public Health Act, 1875. The practice ought for very substantial reasons to go upon different lines: local boards are public bodies who do not act for their own profit: they are armed with powers for the benefit of the neighbourhood: they stand upon a different footing from railway companies which act for their own gain. It may be that the mischief done by local boards

(1) 37 L. T. (N.S.) 355.
(2) 1 E. & B. 694.
(3) 4 E. & B. 1014.
(4) 1 E. & E. 1077.
(5) 6 W. R. 818.

and railway companies is of a similar nature; but the fact, that in the one case it is done for the public benefit and in the other for private gain, is a consideration entitled to great weight.

Then the claim for compensation was bad; for no amount was mentioned therein.

Bosanquet, Q.C., was not called upon to reply.

BRETT, M.R. I feel some hesitation in deciding this case, because I differ from Bowen, L.J., who has expressed his opinion after full consideration; but I have come to the conclusion that this appeal must be allowed, and that the plaintiff is entitled to the amount found to be due to him by the award. Bowen, L.J., decided that no action could be maintained, because the question of liability had not been determined: in other words, that it is a condition precedent to the validity of the arbitrator's decision either that the dispute as to the question of liability shall be first determined, or that there shall be no question of liability. He did not decide that the jurisdiction of the arbitrator only arises where there is no dispute as to liability, but that the fact of damage and the amount of compensation can be settled by arbitration only when the question of liability has been ascertained. My learned Brother came to this decision, not upon the words of the Act read in their natural sense: he decided the question on the ground of the obvious and insurmountable inconvenience: he construed the words in a particular form. The argument has not turned very much upon the words of the enactment in question, Public Health Act, 1875, s. 308: the counsel have discussed the case almost entirely on the question of inconvenience. It is said that the words of the enactment which I have mentioned are different from those of the Lands Clauses Consolidation Act, 1845, s. 68; but a certain construction of that Act has been adopted, and all the inconveniences suggested arise equally upon the Lands Clauses Consolidation Act, 1845, as upon this enactment. It is said that if the question of liability is not first determined, a long and expensive inquiry as to the fact of damage may turn out futile; but that objection equally occurs under the Lands Clauses Consolidation Act; the plaintiff in an action upon the award will fail; he cannot recover

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if he is unable to prove his title: he will encounter the same difficulty as he encounters now. It is said that difficulties arise because the fact of compensation is inquired into first; but the same difficulties arise if the question of liability is first inquired into, because it may ultimately turn out that no compensation can be gained because no damage has been suffered, and the prosecution of the supposed claim may be expensive. The inconvenience of separate inquiries arises equally in each case. But the argument of inconvenience does not enable us to construe the Act. It is said that if we decide for the plaintiff we must overrule decisions upon statutes substantially the same as this: and that a different course must be followed because the ground of compensation is different from that applicable to the Lands Clauses Consolidation Act. It is said that a different kind of compensation arises, and that a different kind of procedure must be implied: if any words are to be implied, the result is the same as if they had been actually written into the enactment. The decisions do not turn upon the point before us. The decision in *Reg.* v. *Metropolitan Commissioners of Sewers* (1) went upon the ground that the arbitrator had decided the question of liability and not merely the amount of compensation; that decision is not material to the point before us, and we do not interfere with that case, for there the award was bad, and the Court were right in refusing to act upon it. And in a subsequent case, *Bradley* v. *Southampton Local Board* (2), Lord Campbell, C.J., stated in effect that the ground of the decision in *Reg.* v. *Metropolitan Commissioners of Sewers* (1) was that the commissioners asserted that some other person than themselves was liable, and yet the arbitrator took upon himself to decide the question of liability. I need not go through the cases, because both sides have admitted that the point as to which procedure is to be first taken has never been decided. We must decide upon the words of the statute, but I think that the course of procedure is the same as under the Lands Clauses Consolidation Act, 1845; it is not merely that the language allows it, but the result is the same. There is nothing which enables me to construe the Public Health Act, 1875, s. 308, in a manner different

(1) 1 E. & B. 694. (2) 4 E. & B. 1014, at pp. 1017, 1019.

from the ordinary meaning of the words which have been used. The question is whether any time has been fixed for holding the inquiry: the section merely enacts that "full compensation" shall be made: there is no limitation of the time when the inquiry as to compensation is to take place; there is no statement as to what are the conditions precedent to the holding of the inquiry except that there must be a dispute. It seems to me that the procedure by arbitration can be taken at any time; possibly by another process the liability to pay may be determined before the amount of compensation is fixed; I am not prepared to say that such a process may not be properly taken. But it is clear at all events that the question of the amount of compensation may be settled first, and I cannot agree with the view of Bowen, L.J. The fact of the compensation being first determined is no bar to this action, which is maintainable. The arbitrator did not determine whether the defendants or some other persons were liable to pay: he merely awarded the amount of compensation.

As to the objection made upon the claim, I think that there is nothing in it.

The action therefore being maintainable, nothing has been stated to shew that the amount of the award is not right.

I repeat that in my view the procedure under the statutes cited is uniform: it may not be rigid, but it is similar.

LINDLEY, L.J. The plaintiff is entitled to recover. The action is brought on an award whereby compensation is given for injuries alleged to be caused by altering the level of a road: and upon looking at the facts it is plain that the real question between the parties was whether the defendants could justify what they had committed as acts done by them as surveyors of highways, in which case, as they contended, the plaintiff would not be entitled to compensation. But the question which we have to decide is whether it was incumbent upon the plaintiff to get the question of liability determined before the proceedings for compensation were commenced. The answer must depend upon the language of the Public Health Act, 1875, s. 308. The section does not prescribe the time when the liability shall be determined; nor does it require any other course to be adopted than that which the plaintiff has followed. I fail to see what it is that the

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plaintiff has done that is wrong: he has not departed from the language of the Act. That consideration ought to dispose of this action. We were referred, however, to certain cases which were decided on similar statutes: one of these was *Reg.* v. *Metropolitan Commissioners of Sewers* (1). The decision, no doubt, is somewhat material; but it is important to observe that when that case was decided a difference of opinion existed amongst the judges and the Courts as to the proper mode of proceeding under the Lands Clauses Consolidation Act, 1845: it was not settled what the functions of the arbitrator really were. Now this question is well settled: the arbitrator and the jury assume that the applicant is entitled to succeed, and they settle only the amount of the compensation. This procedure is perfectly well known now. In *Reg.* v. *Metropolitan Commissioners of Sewers* (1), the arbitrator had taken upon himself to determine the question of liability: he held in effect that the commissioners were liable: the Court of Queen's Bench refused to grant a mandamus, because the liability was disputed, and if it was seriously disputed, the Court could not do otherwise. The decision was that a mandamus ought not to be granted. It is said that in that case the award was void and altogether wrong, because the question of liability had not been previously determined; but the ground of the decision is explained by Lord Campbell, C.J., in the subsequent case of *Bradley* v. *Southampton Local Board* (2). Then reference was made to *Reg.* v. *Burslem Local Board of Health* (3). No doubt a great deal was said in that case as to the balance between convenience and inconvenience; but each course is inconvenient; each mode of procedure has its disadvantages. I do not think that we ought to disturb the practice which has been established, and the present case is not governed by the decision in *Reg.* v. *Burslem Local Board of Health* (3); and in *Uttley* v. *Todmorden Local Board of Health* (4), no objection appears to have been made to assessing the compensation before determining the question of liability. It is a matter of very considerable doubt which procedure is the more convenient. In *Reg.* v. *Wallasey Local Board* (5) a man-

(1) 1 E. & B. 694.
(2) 4 E. & B. 1014, at pp. 1017, 1019.
(3) 1 E. & E. 1077.
(4) 44 L. J. (C.P.) 19.
(5) Law Rep. 4 Q. B. 351.

damus was applied for before compensation was assessed, and it was held that the prosecutor was entitled to it. There was a time when the practice under the Lands Clauses Consolidation Act, 1845, was unsettled: it is now perfectly settled. I cannot say that the plaintiff was not entitled to adopt the course which he has taken, and I think that he is entitled to judgment.

FRY, L.J. I entirely agree. We must look at the words of the Public Health Act, 1875, ss. 179, 180, 308. Persons who claim compensation may have several questions to be determined; but only two are to be referred to arbitration: the rest are to be decided in the ordinary manner by ordinary tribunals. An applicant for compensation is primâ facie dominus litis, and therefore we ought to ascertain whether the Legislature has interfered with his primâ facie right to choose his mode of procedure: I can find nothing of the sort. The next question to be inquired into is whether there is such a balance of convenience and inconvenience that one course ought to be adopted rather than another: I think that there is no balance of that kind; and in many cases it may be very inconvenient to determine first the question of title. I see no reason on that ground to put a restriction on the proceedings of the claimant for compensation. There are two lines of decisions upon statutes analogous to that before us: two of them, *Reg.* v. *Metropolitan Commissioners of Sewers* (1), and *Reg.* v. *Burslem Local Board of Health* (2), indicate that it is more desirable to have the question of liability determined first; but other decisions seem to shew that it is more convenient that it should be determined last. No doubt, there might have been in the first instance an application for a mandamus, but the claimant for compensation may proceed otherwise if he thinks fit.

Appeal allowed.

Solicitors for plaintiff: *Mackeson, Taylor, & Arnould,* for *Joseph Higgs, Brierley Hill.*

Solicitors for defendants: *Byrne & Lucas,* for *Homfray & Holberton, Brierley Hill.*

(1) 1 E. & B. 694. (2) 1 E. & E. 1077.

J. E. H.

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July 3.

THE QUEEN ON THE PROSECUTION OF THE EARL OF LONSDALE *v.* YATES.

Criminal Law—Defamation—Prosecution for Newspaper Libel without Fiat of Director of Public Prosecutions—Information filed by Order of Court—Newspaper Libel and Registration Act, 1881 (44 & 45 *Vict. c.* 60), *s.* 3.

The Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 3 —which enacts that no criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England or Her Majesty's Attorney General in Ireland being first had and obtained—does not apply to criminal informations for libel filed by order of the Court at the instance of private prosecutors.

So *held* by Field, J., Denman, J., and Mathew, J. (Lord Coleridge, C.J., and Hawkins, J., dissenting).

Rule calling on the prosecutor to shew cause why a criminal information for a libel published in "*The World*" newspaper should not be quashed and taken off the file of the Court, on the ground that the fiat of the Director of Public Prosecutions had not been previously obtained as required by the Newspaper Libel and Registration Act, 1881, 44 & 45 Vict. c. 60, s. 3.

It appeared that a rule had been made absolute for a criminal information against the defendant, the proprietor of the newspaper, without any written fiat or allowance of the Director of Public Prosecutions having been obtained.

May 9, 10. *Sir H. James, A.G.* (*Charles Hall, Q.C.*, and *Danckwerts*, with him), shewed cause. It is unnecessary in proceedings by way of criminal information for libel to obtain the fiat of the Director of Public Prosecutions. First, a criminal information by a private prosecutor is the act of the Crown through its officer and cannot be affected by a statute which does not expressly refer to it. The present information purports to be by the Queen's Coroner, who is an officer representing the Crown in this court. He acts in fact as deputy of the Attorney General, but the information, whether filed by the Attorney General or the Queen's Coroner, is equally a proceeding on behalf of the Crown. In consequence of some laxity in the

mode in which these informations were granted, the Act 4 & 5 Wm. & M. c. 18, enacted that the Queen's Coroner should not grant informations without leave of the Court; but this does not affect the nature of the proceeding, which, apart from the statute, is the same whether instituted by the Coroner or the Attorney General. And it will not be contended that the rights of the Attorney General are indirectly taken away by 44 & 45 Vict. c. 60, s. 3.

[He referred to the following authorities on the law and practice of informations: 2 Hawkins' Pleas of the Crown—Informations, 356; *Rex* v. *Wilkes* (1); Bacon's Abridg. Informations; *Rex* v. *Berchet* (2); Tancred on Quo Warranto and Informations.]

Secondly, assuming that the proceeding is not on behalf of the Crown itself, it cannot be presumed without express words that the Act was passed for the purpose of ousting the jurisdiction of the Queen's Court and giving the Director of Public Prosecutions the power of controlling its proceedings. The jurisdiction of the Crown cannot be excluded without express provision: *Ex parte Postmaster General, Re Bonham* (3); *Thatcher* v. *Waller* (4); *Foster's Case* (5); *Smith* v. *Commissioners of Sewers* (6); *Rex* v. *Morley*. (7) In the case of a criminal information no prosecution is commenced until the information is filed. But the rule granting leave to file the information is the order and direction of the Court, and if it is to be quashed because the fiat of the Director of Public Prosecutions has not been obtained, the jurisdiction of the sovereign exercised in her court is, without express enactment, taken away.

The better construction is that the section was not meant to interfere with the jurisdiction of this Court in granting informations, but that it applies only to indictments and summary proceedings.

Charles Russell, Q.C. (*Poland*, and *A. G. James*, with him), in support of the rule. To make the sanction of the Director of Public Prosecutions necessary before leave is given to file an

(1) 4 Burr. 2527.
(2) 1 Show. 106.
(3) 10 Ch. D. 595.
(4) Sir T. Jones, p. 53.
(5) 11 Rep. 56.
(6) 1 Mod. 45.
(7) 2 Burr. 1041.

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information for libel is not to oust the jurisdiction of the Crown. An information for libel in this Court is a prosecution; it has all the incidents of a prosecution, and under 4 & 5 Wm. & M. c. 18, s. 1, the Clerk of the Crown has to take recognisances in order that it may be effectually prosecuted. When does the prosecution commence? It is not necessary to decide the question, but it would appear to be at the time when the application for the rule nisi is made. If this be the case, there can be no difficulty in requiring the fiat of the Director of Public Prosecutions as a preliminary to the application, for there will then be no interference with any order of the Court. If it were meant that s. 3 should be confined to summary proceedings it would have been easy to say so, more especially when the next section refers to such proceedings. It may be admitted that the Act does not apply to informations by the Attorney General ex officio, for they are proceedings by the Attorney General as a member of the executive government. But in the case of informations by a private prosecutor there is no ground for departing from the ordinary meaning of the words "no criminal prosecution shall be commenced," more especially when it is remembered that the tendency of modern legislation has been to restrain private persons from putting the criminal law in motion.

Cur. adv. vult.

July 3. The following judgments were delivered: —

MATHEW, J. This was a rule to quash an information for libel filed by order of the Court against the defendant, who is the proprietor of the newspaper "*The World*," on the ground that the written fiat or allowance of the Director of Public Prosecutions had not been obtained.

The application raised the question, which turned out to be one not easily answered, whether a criminal information is a prosecution within the meaning of the 3rd section of the Newspaper Libel Act, 1881.

The difficulty of ascertaining the meaning of the legislature upon the point is one of a class with which the Courts are but too familiar, and is due to the fact that the language of the enactment is neither wholly popular nor altogether technical, and is

therefore not to be interpreted readily either by a lawyer or a layman.

The attempt to construe the Act will it seems to me be best made by a consideration of the state of the law before the statute passed, and of the provisions by which the existing law was intended to be amended.

Prior to the Act of 1881, a newspaper proprietor, publisher, editor, or other person responsible for the publication of a newspaper might be proceeded against criminally for a libel published in the paper; (1), by information filed ex officio by the Attorney General, or by the Queen's Coroner by order of the Court of Queen's Bench under 4 & 5 Wm. & M. c. 18; (2), by a summons or warrant issued by a magistrate; and (3), by bill of indictment presented to a grand jury.

With respect to proceedings by way of criminal information at the suit of a private prosecutor, it was only when the libel was of a nature, to use the language of Blackstone, "so gross, notorious, and atrocious," as to justify in the judgment of the Court a departure in the interest of the public from the ordinary course of the criminal law that an information could be had recourse to. A defendant was protected from the vexatious use of this mode of proceeding by the requirement that judicial sanction should be obtained before the information was filed, and also by the provisions of 4 & 5 Wm. & M. c. 18, and 6 & 7 Vict. c. 96, which entitled a successful defendant to the costs of his defence.

But with respect to proceedings before a magistrate or the grand jury the position of a defendant was very different. In any case where an action would lie for a libel without proof of special damage, criminal proceedings might be taken by a private prosecutor, and an application might be made to a magistrate to send a defendant for trial; or, without any notice to a defendant, a bill might be presented to the grand jury. This was a state of the law likely to lead to great abuses, and to expose the class of persons responsible for the publication of newspapers to criminal proceedings of the most vexatious and harassing description, and there was the further grievance that the costs of a successful defence could not be recovered from the prosecutor. It was with this state of things that the Newspaper Libel Act, 1881, was

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intended to deal, and the Act contains several provisions for the protection of newspaper proprietors the meaning of which is sufficiently clear.

Sects. 2, 4, 5, and 6, are meant to protect newspaper proprietors from criminal proceedings in respect of libels not of a serious nature, and these sections clearly relate to ordinary criminal proceedings only—that is, to proceedings before a magistrate or grand jury.

Then comes the question upon which our judgment in this case depends—has the 3rd section any wider operation? By s. 3 it is enacted that "no criminal prosecution shall be commenced against a newspaper proprietor for any libel published therein without the written fiat or allowance of the Director of Public Prosecutions in England or Her Majesty's Attorney General in Ireland." Does this apply to offences of the character referred to in the other sections of the Act, or is it applicable to libels of every description, whether grave or trivial, and to proceedings by way of criminal information as well as to proceedings in the ordinary course of the criminal law.

In the first place, it is manifest (and this was conceded in the course of the argument by the defendant's counsel) that the section does not apply to criminal informations filed by the Attorney General, for if it did the Attorney General could not proceed in England without the permission of an official who is his subordinate and acts under his superintendence (see 42 & 43 Vict. c. 22, s. 2), and in Ireland without a fiat issued to himself.

Some proceedings other than those to be instituted by the Attorney General ex officio must therefore have been contemplated.

Then does the section apply to the analogous proceeding of a criminal information filed by order of the Court? The object of the Act, as disclosed in the ss. 2, 4, 5, and 6, was to prevent vexatious prosecutions. But as regards proceedings by criminal information filed by the Queen's Coroner, was not this result secured by 4 & 5 Wm. & M. c. 96, s. 18?

Was the Court likely to fail to discover that an application for a criminal information had been made vexatiously? and if the Court failed to make the discovery, was the Public Prosecutor

likely to be more successful? Is it probable that Parliament intended to alter the law in respect of the classes of libels usually dealt with by criminal information?

It would be difficult to suggest on what ground newspaper proprietors could reasonably ask for the interference of Parliament on their behalf when, for instance, a libel was deliberately published of an individual so malicious and indefensible that the Court would order a criminal information.

Again, was it meant that such libellers should have a greater protection than ordinary offenders? for this would be the result of holding that the Act of 1881, as well as the Act of Wm. & M., applied to offenders of the former class.

But considerations of the probable intention of Parliament cannot avail against the clear language of an enactment, and it was argued for the defendant that s. 3 was perfectly clear.

But is this so?

The section says, "No criminal prosecution shall be commenced, &c."

The learned counsel for the defendant was pressed during the argument to say at what stage of the proceedings by way of criminal information a prosecution could be said to have commenced. He admitted, as I understood him, that the fiat of the Public Prosecutor might not be necessary before the application to the Court for an order to file the information. But he argued that the proceedings assumed the character of a prosecution within the meaning of the section when a rule nisi had been obtained from the Court to file the information and the rule had been served on the defendant.

But it seems clear to me that the commencement of the prosecution is the filing of the criminal information. The order of the Court under 4 & 5 Wm. & M. is analogous to the fiat under s. 3 of the Act of 1881. If this be so, and the order of the Court must be followed by the fiat of the Public Prosecutor, it must have been intended by the legislature either that the Public Prosecutor should agree as of course with the Court, and allow the proceedings to be continued, or that he should differ and prohibit them.

In the one case the protection of his fiat would be illusory. In

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the other he would necessarily be called on (upon what materials does not appear) to exercise the functions of a Court of final appeal from the order of the Queen's Bench.

I cannot suppose in the absence of apt and decisive language for the purpose that any such result was intended by Parliament.

It seems to me so unreasonable that I am bound, if it be possible without violence to the language of the section, to find some other meaning for its provisions. I think the proceedings contemplated by s. 3 did not include a criminal information. What was meant seems to me to have been a prosecution in the ordinary sense of the term, viz., a criminal charge made before a magistrate or a grand jury; and not the extraordinary proceeding by way of criminal information. The language of s. 6 is strongly confirmatory of this view. By that section every libel or alleged libel, and every offence under this Act, shall be deemed to be an offence within the meaning of the Act to prevent vexatious indictments.

It may not be easy to bring the precise terms of this section into harmony with the rest of the statute, and it is unnecessary to determine whether s. 3 and s. 6 are each applicable to the same proceedings, so that the fiat of the Public Prosecutor and the order of a judge would in some cases be necessary before a private prosecution could proceed.

But offences punishable by criminal information are clearly not within the Vexatious Indictment Act, which contemplates only ordinary criminal proceedings; and it would seem to follow that such offences were not within the meaning or operation of s. 3.

For these reasons I am of opinion that the 3rd section does not apply to criminal informations filed by order of the Court, and that this rule must be discharged.

HAWKINS, J. I am of opinion that the 3rd section of the Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), applies to criminal informations for libel at the instance of private prosecutors, and that the written fiat or allowance of the Director of Public Prosecutions is a necessary preliminary to the commencement of such criminal proceedings; which commence-

ment I think is when the rule nisi for a criminal information is applied for. See *Clarke* v. *Postan* (1) (Bosanquet, J.), where the mere making of a criminal charge before a magistrate, who instantly dismissed it, was held sufficient foundation for an action for malicious prosecution. If it were otherwise, the most scandalous and false affidavits might be used on the application for a rule nisi with impunity against any civil action.

It seems to me impossible to doubt that a criminal information under which (if found guilty), a person may be imprisoned and fined as a criminal, is not a "criminal prosecution" within the ordinary and popular sense of those words. It is contended, however, by the prosecutor in the present case that we ought in the section referred to to construe them as excluding all criminal informations and as applicable only to other criminal proceedings, viz., by indictment or before a Court of summary jurisdiction; and it was argued before us that, having regard to the existing state of the law at the time of the passing of the Act, the intention of the legislature that they should be so construed is apparent and obvious. As regards informations ex officio filed by the Attorney General by virtue of his office, on his own responsibility, in exercise of the prerogative of the Crown, it cannot be doubted that they are excluded from the operation of the section; for the general rule is well established that the rights of the Crown shall not be barred or restrained by any statute unless it be specially named, which is not the case in the section now under consideration. Informations at the instance of private persons stand, however, upon a totally different footing. With regard to them, although exhibited in the name of the Queen, they are not in any sense state prosecutions, any more than are ordinary indictments, which are also preferred in the name of the Queen. Formerly, criminal informations for misdemeanours were exhibited by the Clerk of the Crown without check or restraint, at the mere will of any individual. This privilege came to be so abused by malicious and contentious persons, that the legislature thought fit to put a limit upon it, and accordingly by statute 4 & 5 Wm. & Mary, c. 18, s. 1, it was enacted that the Clerk of the Crown should not without *express order*, to be given by the

(1) 6 C. & P. 423.

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Court of King's Bench in open Court, exhibit, receive, or file any such information. From thenceforward a restriction was placed upon the exhibition of criminal informations for trivial matters or for purposes of malice or extortion; but there was still nothing to prevent the presentment to a grand jury of a bill of indictment for any offence at the mere will of any person who thought fit to present it. In course of time, however, it was found that this power, too, was grievously abused for unworthy purposes. Bills of indictment were often presented and easily procured to be returned as true bills upon the most unsatisfactory evidence, subject to no test of cross-examination, and were used as instruments of oppression and extortion. To remedy to some extent this evil, the Vexatious Indictments Act, 22 & 23 Vict. c. 17, was passed, which, by s. 1, provides that no bill of indictment for certain misdemeanours therein mentioned (not including libels) shall be presented to or found by any grand jury, unless (1st), the prosecutor has been bound to prosecute or give evidence against the person accused; or (2nd), unless the accused has been committed for trial or bound by recognizances to appear and answer to an indictment to be preferred against him for such offence; or (3rd), unless such indictment for such offence be preferred by the direction or with the consent in writing of a judge of one of the Superior Courts, or of the Attorney or Solicitor General. The 2nd section of the Act entitles the person who prefers a charge to insist upon being bound over to prosecute in the event of a magistrate refusing to commit or hold the accused to bail—so that any malicious person could, in one way or other, insist upon his right to present a bill of indictment.

The state of the law, then, when the Newspaper Libel Act, 1881, was passed, stood thus: a criminal prosecution for the offence of libel could only be instituted by criminal information or by indictment, no other form of criminal proceeding for libel being known to the law. No criminal information could be filed without the express order of the Court of Queen's Bench, but a bill of indictment might be preferred at the mere will of any one who thought fit to present it.

It is unnecessary to enter minutely into the history of the

Newspaper Libel Act, 1881, or to endeavour to point out all the reasons which brought about its enactment; but it is beyond all question that one great object of the legislature was to afford to newspaper proprietors more protection than they then enjoyed against hostile proceedings for trivial libels. Its preamble recites that it is expedient to amend the law affecting civil actions and criminal prosecutions for newspaper libel. By s. 3 it is enacted that "*No criminal prosecution* shall be commenced against any proprietor, &c., of a newspaper for any libel published therein without the written fiat or allowance of the Director of Public Prosecutions." The 5th section for the first time gives a court of summary jurisdiction, in the course of an investigation with a view to an indictment, power, *with* the assent of the accused, to deal summarily with trivial libels, and s. 6 extends the Vexatious Indictments Act to the offence of libel.

Now, the first question I have asked myself is this—If it was intended by the legislature to include within the 3rd section all the forms of criminal procedure known to the law for the offence of libel, what more apt, simple, and unequivocal language could it have used to express that intention than the words "*no criminal prosecution*" shall be commenced without the fiat of the Public Prosecutor? and if on the other hand the legislature had intended to exclude criminal informations from the operation of the section, what more inapt or misleading language could it have selected to express that intention?

To neither of those questions have I been able to suggest to myself an answer. Why then am I, sitting here judicially, to come to the conclusion that the legislature has deliberately said what it did *not* mean, and left unsaid, or rather said the contrary to, that which it intended to express.

It has been suggested that the legislature must be taken to have proposed the Act under discussion with full cognizance of the statute of Wm. & M., which gave effectual protection against vexatious and frivolous criminal informations, and must be taken to have intended s. 3 to apply to indictments only. If it were so, how strange it is that with the knowledge that there were only two forms of criminal procedure applicable to libel, viz., information and indictment, the words "*no indictment*" were

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not substituted for the comprehensive and unambiguous words, "*no criminal prosecution.*" It was urged, moreover, that by including criminal informations within the 3rd section we should be construing the Act in such a manner as to give the Public Prosecutor a controlling power over Her Majesty's Court of Queen's Bench, and to interfere with the prerogative and jurisdiction of that Court. I think no such consequences would result from such a construction of the section. The result of our so interpreting the Act would indeed be to vest in the Public Prosecutor, who, in addition to his legal attainments, ought to be a man of experience, knowledge of the world, common sense and discretion, the power and the duty to say, having regard to all the surrounding circumstances of each particular case—into all which circumstances he ought to make inquiry—whether it is expedient that a newspaper proprietor should *under all those circumstances* be criminally prosecuted at all, and to grant or refuse his fiat accordingly, even though he may be satisfied that in strictness of law a libel has been published ; and I can imagine many cases in which that power might be most usefully exercised—cases in which irretrievable mischief and injustice might be done by the first step in a prosecution, whether by application to the Queen's Bench for leave to file a criminal information, or by proceedings before a magistrate with a view to an indictment. But though the Public Prosecutor has the power to grant or refuse his fiat, he has no power, if he grants it, to direct in what form the prosecution shall be conducted. The Court of Queen's Bench, on the other hand, has not, and never had, the power to put a veto upon a prosecution ; but it had and has the power, under the statute of William & Mary, to refuse to allow it to be instituted in the form of a criminal information, and it does constantly so refuse in cases which, though justifying the application of the criminal law, can be equally well dealt with by a grand jury upon a bill of indictment.

The distinction between the power of the Public Prosecutor and that of the Queen's Bench is obvious, and I see no reason why these two powers should not exist harmoniously together: the Public Prosecutor determining in the first instance whether a criminal prosecution is expedient and should be allowed—the

Queen's Bench determining whether to permit the use of a criminal information or to leave the prosecutor to his other remedy by indictment. These jurisdictions could never clash, for the jurisdiction of the Public Prosecutor must necessarily have ceased before that of the Queen's Bench came into existence. But the reason urged for excluding informations from the operation of the section would also apply to an indictment preferred by order of a judge or the Attorney or Solicitor General under the Vexatious Indictments Act. It might just as well be argued that the legislature never intended to give the Public Prosecutor power practically to supersede the order of a judge, or the fiat of the law officers of the Crown; and yet that some indictments are within the operation of the section is clear, or it would have no operation at all. It is impossible to suppose the legislature to have intended that no restraint should be put upon a vindictive unreasonable prosecutor, who insisted upon being bound over to prosecute notwithstanding the refusal of the magistrate to commit, or of a judge to allow an indictment to be preferred before the grand jury.

To extend the exception to indictments by order of a judge or the Attorney or Solicitor General as well as to criminal informations, would practically limit the 3rd section to proceedings before a magistrate preliminary to an indictment. If such was the intention of the legislature how easy it would have been to express it in so many words.

I cannot think the legislature intended the language used in the 3rd section to be construed in any other than its popular sense, and so as to comprehend every criminal prosecution; that is, it intended what it said. Probably when the Act of 1881 was passed, the jurisdiction of the Queen's Bench to refuse a criminal information, and of a judge or the Attorney or Solicitor General to order an indictment, was altogether lost sight of, and possibly had it not been so, the 3rd section might have been differently framed; but this is mere speculation. We are not here to say what the legislature would have done if the suggested inconveniences had been present to its mind, but what it has done. Even if we were satisfied that the section is defective by reason of an oversight, we have no right to remedy the defect by

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engrafting an exception upon clear and explicit language—that would be to legislate, which we have not the power to do—and not to construe the language as we find it. (1) It is not our duty to amend defective legislation, but simply to administer the law as it stands.

For the reasons I have stated I am of opinion that this information ought to be quashed; but as the majority of the Court take a different view, the rule must of course be discharged. In the course of the discussion I have entertained some doubt whether the omission to obtain the fiat of the Public Prosecutor was a mere irregularity in procedure capable of being waived by omitting to take the objection at the proper time, viz., in shewing cause against the rule nisi, or whether the objection goes to the original jurisdiction of the Court. Our refusal to quash the indictment on motion will not prevent the defendant from raising the whole question in such a shape as he may be advised, either by plea to the jurisdiction or by assigning error in fact, if the judgment on the information should be given against him. (2)

FIELD, J. This is an application by the defendant, the proprietor of a newspaper, to quash for defect of jurisdiction a criminal information for libel exhibited against him by the Queen's Coroner by order of this Court.

The defect alleged is the absence of the fiat of the Director of Public Prosecutions, the necessity for which as a condition precedent is said to arise under the 3rd section of 44 & 45 Vict. c. 60, which enacts that no "criminal prosecution" for such a libel shall be commenced against any proprietor of a newspaper without the written fiat or allowance of the Director of Public Prosecutions in England or of Her Majesty's Attorney-General in Ireland being first obtained.

The short question, therefore, is whether an information so filed at the instance of a private individual is a "criminal prosecution"

(1) See *Warburton* v. *Loveland*, 2 Dow. & Cl. 489; *Miller* v. *Salomons*, 7 Ex. 560, per Pollock, C.B.; *Lee* v. *Bude Ry.*, Law Rep. 6 C. P. 580, per Willes, J.; *Reg.* v. *Cleworth*, 4 B. & S. 934, per Blackburn, J.

(2) See *Reg.* v. *Marsh*, 6 A. & E. 236; *Reg.* v. *Heane*, 4 B. & S. 947.

within the meaning of the section. That those words are sufficiently large in their widest sense to include such a proceeding no one I think doubts, but it does not of necessity follow that the words are used in that sense. Indeed, it is clear that they are not, for in their largest and widest sense would be included an information filed ex officio by Her Majesty's Attorney-General, whether of England or Ireland, and it is certain that such a proceeding is not a "criminal prosecution" within the meaning of the 3rd section.

What then is the limitation to be put upon these general words? Is everything but ex officio information included? or is there to be imposed any further limitation? The question is not altogether easy to answer, in consequence of the use by the legislature of general and what may be almost called popular language instead of precise words, the well-known import and effect of which when used leave no room for doubt as to their meaning. To enable this question to be answered, the first step is to see what at the time of the passing of the Act were the several modes by which an individual could commence and prosecute any criminal proceedings in such a case, and what were the mischiefs attending such proceedings which the legislature wished to prevent.

The ordinary remedy of a private prosecutor for this, as for any other offence punishable by the criminal law, was of course by bill of indictment presented to and found by a grand jury, and such a bill it was competent to any individual to prefer without any preliminary inquiry, order, fiat, or allowance. The finding of such bill might therefore be, and often was, the first step in or commencement of a prosecution, for although it was a usual and generally a fair and proper course for a prosecutor before preferring his bill to summon the proposed defendant before a magistrate, and so institute an inquiry into the alleged offence, the result of which might be the committal or binding over or discharge of the defendant, such a step was not a necessary preliminary to the sending up of the bill, and it was constantly found that although the magistrate dismissed the application, a vindictive or vexatious prosecutor still preferred his bill, and

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that many vexatiously did so without going before a magistrate at all.

Moreover, the very institution of the preliminary investigation was made use of by irresponsible prosecutors as an instrument of vexation and revenge, and however trivial the libel, or whatever might be the circumstances under which it had appeared in the newspaper, whether its publication amounted to an offence within the meaning of Lord Campbell's Act or not, the newspaper proprietor was often subjected to expensive and harassing proceedings, the expense of which even when he was successful fell upon himself.

By the side of this ordinary remedy with these attendant evils and others, which are remedied by the 4th and 5th sections of the Act we have to construe, there stood the remedy by criminal information.

This exceptional remedy had originally probably been part of the general privilege of the Attorney-General to file informations in the Court of Queen's Bench at his will by virtue of his office, but in course of time so much of the privilege as consisted in filing such an information at the suit of a private individual had become by usage vested in another officer of the Crown, the Queen's Coroner, who was also an officer of this court. This remedy had, however, also come to be accompanied in course of time by some at least of the same evils as attended an ordinary prosecution for libel, but the latter were in the case of this proceeding removed by express legislation as far back as the 18th chapter of the 4 & 5 Wm. & M. By the 1st section of that Act the Queen's Coroner was prohibited from filing any such information without the express order of this Court, and from issuing any process under it without the prosecutor coming under recognizance effectually to prosecute the information and abide by the order of the Court, to whom power was given to award costs against him in certain events.

Since that statute, therefore, no prosecutor can proceed by way of criminal information without obtaining the express order of this Court, and which he can only obtain upon rule nisi, made absolute after no cause shewn, in which proceeding he is obliged

by the practice of the Court to bring before it the terms of the libel of which he complains, so that its nature and character may be seen; he is further obliged to deny upon oath that there is any truth in or foundation for the libel, and if he fail his recognizances are estreated unless he pay such costs as the Court may award. This mode of proceeding was therefore placed by the legislature absolutely under the control of this Court, which in its discretion granted or refused its order, and only granted it with great care and deliberation, and never in aid of any unworthy or vindictive prosecutor or trivial or vexatious prosecution. A more complete protection to the subject against groundless, harassing, and vexatious proceedings it is hardly possible to conceive.

Now, whatever uncertainty may exist as to the precise limit to be put upon the language of the 3rd section of the Newspaper Libel Act, it is quite clear that the necessity for the fiat does extend to summary proceedings for newspaper libel before magistrates, and as to them there is no uncertainty as to the period at which the prosecution in such a case commences; the result is, that no information or complaint for such a libel can be made without the fiat of the Director in England or the Attorney General in Ireland, who will of course take care not to authorize any other than legitimate proceedings. The words "criminal prosecution" have therefore at least one important application.

But besides dealing with this proceeding by s. 3, it is also clear that the preferring of a bill of indictment is dealt with by the Act, but not, as it seems to me, because it is directly included in the words "criminal prosecution" in s. 3, but by the extension of s. 6 to the offence of newspaper libel of the provisions of the Vexatious Indictments Act, 22 & 23 Vict. c. 17. By that Act, as is well known, certain specific offences (prosecutions by private persons which had become in practice vexatious and harassing) were placed under certain restrictions, for (although dealing very guardedly with the common law right of the subject to prefer a bill before a grand jury) it imposes alternative conditions, one of which is a necessary preliminary to its exercise.

These conditions are, first, an information before a magistrate, who may either commit or bind over or discharge the defendant;

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or secondly, the direction of or the consent in writing of a judge or the Attorney or Solicitor General. In the first alternative, if the magistrate commit or hold to bail, the case of course goes to trial in the ordinary way, and the prosecutor enters into the ordinary recognizance to prosecute and abide by the order of the Court, but the committal or holding to bail is not an essential preliminary to an indictment, for a bill may also be preferred even if the magistrate discharge the defendant, the only condition in that event being, by s. 2, the recognizance of the prosecutor.

If, therefore, the prosecutor do not obtain the direction or consent of a judge or law officer no indictment can be preferred without the prosecutor rendering himself liable for costs, nor without the fiat of the Director being obtained for the preliminary proceedings, so that by this construction a complete protection seems to me to be effected against vexatious or trifling prosecutions.

But the Vexatious Indictments Act provides another mode in which a bill may still be preferred without any preliminary magisterial proceedings, and that is the direction or consent in writing of a judge or law officer, and it seems to me that in reference to this latter mode of proceeding it could not have been intended that the fiat of the Director was also necessary. I am unable to see any reason why that additional safeguard should be required, or that expense and trouble should be imposed upon a prosecutor. Is it to be supposed that if a judge or law officer, with all the circumstances before him, in the exercise of his discretion "directed" a prosecution, that the order was to be of no avail without the allowance of the Director of Public Prosecutions? or if the prosecutor, disclosing all necessary facts to the judge, obtained his consent in writing, that must be subject to a previous preliminary investigation or subsequent allowance or fiat? I cannot think so. Of course if the words of the Act plainly said it, such would be the result; but to my mind the words actually used in s. 3 are satisfied by the application of them to summary proceedings, and do not extend to an indictment commenced merely by itself.

The question now remains (not free from doubt, as evidenced by the views expressed by some of my learned Brethen on the

argument, but which after careful consideration I am compelled to answer in the negative) whether a criminal information at the suit of a prosecutor is included in the provisions of s. 3.

Now, as I have before said, it is admitted that an information "ex officio" by the Attorney General is not a criminal prosecution within it. That it is not so is evidenced by the fact that the Attorney General for Ireland is constituted the alternative jurisdiction for that country. But that is not the reason for the exclusion, the real ground being (as tacitly admitted by Mr. Russell) that it could not have been intended by the legislature that the discretion of a high public officer like the Attorney General should be submitted to the discretion of the Director of Public Prosecutions, although also a high public officer, for the exercise of the very same functions.

But that ground of exclusion seems to me to apply with at least equal if not greater force to the supposition that the discretion of this Court, the highest criminal court in the realm, is subordinated to that of another tribunal, and before I could arrive at that result I should require much clearer indication of the will of the legisture than I find in s. 3.

In the first place, if the words are to be applied to a criminal information, the period when a prosecution is "commenced" is somewhat uncertain. Is such a prosecution commenced when the order nisi is obtained, or when the information is filed? If the filing of the information is the commencement, then the order of this Court that it shall be filed is in effect rescinded by the refusal of the Director to give his sanction, and Mr. Russell fairly admitted that this consequence would be so unreasonable that he could not contend for it. But he said that such was not the case, and that the prosecution commenced at some earlier period, and (so far as I was able to collect) he fixed that earlier period at the application for and making of the order nisi. But if that be so the consequences appear to me to be as unreasonable as in the other view.

Is the subject to be prevented, in a case in which, in the discretion of this Court if brought before it, he would be entitled to have what he asks for, from making any application for it? Is the Director of Public Prosecutions to be asked to give leave to

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apply for the leave of this Court? Is he to exercise a discretion preliminary to the exercise of a second discretion by another and higher tribunal, acting with all parties before it and with the same identical functions? And if so, with what object?

The action of this Court in granting or refusing an order to file a criminal information guards against all the mischiefs attending either upon summary proceedings or indictment, and the only one which Mr. Russell was able when pressed to point out as the object of the legislature, if the fiat is necessary in criminal information, was the ex parte application for the rule. But that application is either successful or not; if successful it is one which ought not to have been prevented, if unsuccessful the defendant is in no way vexed or harassed by any order.

Again, I say that all these consequences seem to me to be so unreasonable that, unless the legislature has plainly said they are to come into existence, I cannot think that it contemplated them. And in my judgment the words used in the 3rd section are not sufficiently indicative of any such intention. The terms used in that section are general; admittedly they must receive some limitation, and I think that the necessary limitation to be imposed excludes criminal information and indictment when preferred by the direction or with the consent in writing of a judge or law officer.

I think, therefore, that the rule must be discharged.

DENMAN, J. The question in this case turns upon the true meaning of s. 3 of 44 & 45 Vict. c. 60.

The words of that section are as follows:—"No criminal prosecution shall be commenced against the proprietor, &c., of any newspaper for any libel published therein without the written fiat or allowance of the Director of Public Prosecutions in England, or Her Majesty's Attorney General in Ireland, being first had and obtained."

The facts of the present case are: that a rule has been made absolute by which it is ordered that a criminal information be filed against the defendant Yates, who is the proprietor of a newspaper, for an alleged libel appearing in his paper; that a criminal information has been accordingly filed by the Master of the Crown

Office; and that no written fiat or allowance of the Director of Public Prosecutions has been obtained.

At first sight this state of facts would seem to bring the case within the section referred to, and to shew that the information, having been issued in violation of the enactment, ought to be quashed; for there can be no doubt that, according to ordinary understanding among lawyers, and to the words of the most approved text-books, a criminal information filed by the master of the Crown Office is a well-known kind of criminal prosecution; so that the words of the statute, construed according to a well known use of them among lawyers, will include the case. There might be some doubt as to the particular stage of the proceedings at which the prosecution was "commenced;" but this would be immaterial to the decision of the present case, for there could be no doubt, if the section includes a criminal information under the words "criminal prosecution," that the prosecution would have been commenced at the latest when the information was actually filed.

But, notwithstanding the apparent ease and simplicity of the above solution of the case, I have, upon consideration of the whole statute 44 & 45 Vict. c. 60, and the Acts therein referred to, and having regard to the state of the law relating to criminal informations existing at the time when that statute was passed, come to the conclusion that s. 3 does not apply to criminal informations at all; and that the words "criminal prosecutions for any libel" must be construed as confined to proceedings by indictment, or before a magistrate with a view to obtaining either the power of indicting or a summary conviction as provided by the Act. My reasons for thinking that this is the true meaning of s. 3 are as follows:

In 1881, when 44 & 45 Vict. c. 60, was passed, there was in existence, and still is, unrepealed, the statute 4 & 5 Wm. & M. c. 18. That is an Act with which all lawyers are familiar, and which it is impossible to suppose escaped the attention of the legislature. Its object was to prevent the abuses which had arisen owing to the too great ease with which the Master of the Crown Office had exhibited criminal informations on the relation of private prosecutors. The main provision of that Act,

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the whole of which is still in force, and which has been constantly acted upon ever since, is that the Master of the Crown Office "shall not without *express order* to be given by the Court of King's Bench in open Court, exhibit or file any information for misdemeanour." Upon this provision a not inconsiderable and a very well known portion of the jurisdiction, practice, and business of the King's Bench has for nearly two centuries been founded—and in no class of misdemeanor has it been more often called upon to act than in cases of libel, and in no cases of libel more frequently than in applications against proprietors, &c., of newspapers. Nothing can be more improbable than that the legislature, with such a jurisdiction and the statutable requirements in connection with it still in constant operation, should have intended to enact that, either before or after applying to the Court for the "express order" mentioned in that well known statute, a party complaining of a libel in a newspaper should be required to obtain the fiat or allowance of any individual.

But it is not sufficient merely to shew that it is improbable. The true question is, has the legislature so enacted? I am of opinion that it has not. I think that the words of s. 3 do not, when read with the rest of the Act, shew an intention to include, or necessarily or in fact include, criminal informations. They are, no doubt, large enough to include them; but, in the construction of statutes, though where clear and unambiguous words are used—where the language is precise and capable of but one construction—it is not the province of the Court to scan the wisdom or policy of the enactment, but to give effect to the plain meaning of words; yet, where general words are used, capable of including or excluding a particular case, it is I apprehend clearly the duty of the Court to call to its aid the other provisions of the statute itself and of other statutes referred to in it, and, assisted by these, and having regard to the state of the law existing at the time of the enactment, to form its judgment as to the real intention of the legislature, and the true meaning of the language used, in the passages in which it is used.

Sometimes what Lord Cottenham called (1) "flexible" expressions are used; and in such cases when the question arises whether

(1) *Salkeld* v. *Johnston*, 1 Mac. & G. 264.

a particular case falls within the enactment or not, such assistance is of the utmost importance. Akin to this observation is the maxim (1) that all words, if they be general and not express and precise, are to be restricted to the fitness of the matter. It is also a true canon of construction of statutes that the legislature does not intend any alteration in the law beyond what it declares either in express terms or by necessary implication: Maxwell on Statutes, p. 66. There is, moreover, a presumption against any intention not only to oust but to restrict the jurisdiction of the Superior Courts except where such intention is clearly shewn: Maxwell on Statutes, p. 105.

Now, admitting fully that a criminal information in ordinary parlance, and even in ordinary legal parlance, is a kind of criminal prosecution, I am of opinion that, applying the principles above referred to, it is not a "criminal prosecution" within the meaning of those words as used in s. 3 of 44 & 45 Vict. c. 60.

The Act begins by reciting "that it is expedient to amend the law affecting civil actions and criminal prosecutions for newspaper libel." It is said a criminal information is a kind of criminal prosecution, therefore it is included in the preamble of the Act, and if the Act had not intended to include it, it would have used the word "indictments" only. This would be a strong argument if the Act referred to no other proceedings *except* indictments and (possibly) criminal informations, but it does refer expressly in the following clauses 4 and 5 to proceedings before magistrates, which are in their nature the commencement of criminal prosecutions, and which in one case may end in an actual conviction for libel. (s. 5) It seems to me that there is more reason for saying that these are what the preamble refers to, than that the general words "criminal prosecutions" include that peculiar kind of criminal prosecution (fenced about as it already is by 4 & 5 Wm. & M. c. 18), known to every body as a proceeding by way of criminal information. There is indeed one provision in the Act which I think would apply to criminal informations, viz., that in s. 15, which provides that copies of registers shall be conclusive or primâ facie evidence as the case

(1) Bac. Max. 10.

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may be "in all proceedings civil or criminal." This alone would satisfy the words of the preamble. But it is never safe to rely too much upon the words of the preamble either as extending or limiting the enacting parts of the statute.

Now, turning to the words of s. 3, "no criminal prosecution shall be *commenced*." Can it be supposed that these prohibitory words were intended to prohibit a person from doing (or to speak more correctly, from having done for him by the master of the Crown Office) that which he has no power to do, or have done, until he has obtained a rule absolute for an "express order" of the Court of King's Bench that the Master of the Crown Office shall file the information, subject to well known and elaborate provisions by statute, as to recognizances and other matters? Or (if the mere motion for the rule, or any intermediate stage of the proceedings *before* the filing be looked upon as the "commencement" of the prosecution) can it be supposed that the legislature intended that the Director of Public Prosecutions should have the power of vetoing an application to a Court, invested with full power and discretion by a well known statute, to decide whether an information shall or shall not be filed by its own officer? Either supposition seems to be wholly inadmissible.

But, pursuing further the words of s. 3, no criminal prosecution is to be commenced in the cases mentioned "without the written *fiat* or *allowance* of the Director, &c." This seems to me to be very inaccurate language as applied to the case of a criminal information, and equally so whether the commencement of the prosecution be the filing of the information or any anterior proceeding. In the former case the statute gives the Director no power to "fiat" or "allow." He cannot say let it be done or effectively allow it independently of the Court. For whatever he may write, the Queen's Bench is not bound to order an information to be filed. On the other hand, if the motion or any subsequent step short of the filing is the commencement of the prosecution, the words "fiat or allowance" are equally out of place.

Passing on to the succeeding sections of the Act, ss. 4 and 5 contain provisions relating to proceedings in Courts of summary

jurisdiction, where criminal charges are made against proprietors of newspapers for libel; and they both contemplate a proceeding which may end in an indictment or summary conviction, as the case may be, and are wholly inapplicable to a proceeding by criminal information. Section 5 contains a provision enabling the Court of summary jurisdiction in certain cases, with consent of the party charged with libel, to deal summarily with the case, and applies the provision of s. 27 of 42 & 43 Vict, c. 49, relative to indictable offences dealt with summarily. This provision is not applicable to the case of a criminal information. Then by s. 6 it is enacted "that every libel, or alleged libel, and every offence under this Act shall be deemed to be an offence within and subject to the provisions of 22 & 23 Vict. c. 17, intituled an Act to prevent vexatious *indictments* for certain misdemeanours," which provisions again are wholly inapplicable to criminal informations. The words of s. 6 are difficult to construe, but I can put no construction on them which is at all consistent with any view, except that the libels dealt with by the Act are only libels to which the Vexatious Indictments Acts are applicable;—that is, libels for which *proceedings are taken* in such a manner that the Vexatious Indictments Acts *can* apply;—that is, libels which are prosecuted by indictment, or with a view to an indictment or summary conviction;—not libels for which proceedings are taken by application to the Queen's Bench for, or by the actual filing of, a criminal information.

I have now dealt with all the provisions of 44 & 45 Vict. c. 60 which have any bearing upon the question raised before us; and I cannot resist the conclusion that s. 3 of the Act was never intended to apply to criminal informations: that the words "criminal prosecution" do not mean to include, and do not according to true interpretation include, criminal informations or proceedings to obtain criminal informations; but that they are confined to the kinds of prosecution contemplated by ss. 4, 5, and 6 of the Act, and the Acts therein referred to, viz., indictments and proceedings before magistrates with the view of indicting or obtaining a summary conviction in the case provided for by s. 5 of the Act.

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For these reasons I am of opinion that the rule ought to be discharged.

LORD COLERIDGE, C.J. In this case a criminal information has been filed by leave of the Court against Mr. Yates for libel in a newspaper, and the question for our opinion is whether before that leave was given the written fiat of the Director of Public Prosecutions ought to have been obtained. The Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), under which the question arises, undoubtedly contains provisions for the benefit of newspaper proprietors. In this respect it resembles the Act 6 & 7 Vict. c. 96, but it goes further. By s. 2 it allows the publication of bonâ fide reports of certain meetings, and s. 3 is intended to make the prosecution of newspaper proprietors more difficult. Before the passing of the Act one of the commonest modes of proceeding against a newspaper for libel was to apply to the Court for leave to file a criminal information, and to suppose that an Act intended to enlarge the protection of newspaper proprietors did not, by the words "criminal prosecution," include or refer to one of the more frequent modes of proceeding against them, is difficult. If the words of the section were plain, and we had any ground for supposing that the legislature intended to exclude criminal informations from the operation of the Act, the case would be different. I entirely agree with the proposition that s. 3 does not apply to informations filed ex officio by the Attorney General. It would be absurd to suppose that the Attorney General could not file such an information until the fiat of an officer subordinate to himself had been obtained. But with regard to informations at the suit of a private prosecutor no such objection can be raised, and this being the case, I am most unwilling to interpret the Act so as to exclude proceedings which would ordinarily come under the meaning of the expression "criminal prosecution."

I have always had the greatest objection to decisions which appear to me to disregard the ordinary meaning of enactments. We know that it was decided after an Act of Parliament had said that all the jurisdiction of the Exchequer in Equity should be

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transferred to the Court of Chancery, that its jurisdiction in Equity as a Court of revenue was not taken away. One of the greatest of modern jurists persuaded the House of Lords that though it had been enacted that no objection should be taken to the jurisdiction of the Mayor's Court except by plea, yet that objection could be made by prohibition, and it was left for the Court of Appeal at a later period to decide that under similar words the prohibition was taken away. Where a rule had provided that costs should "follow the event," a number of judges decided that a plaintiff who had obtained a verdict was not within the words, and this decision had to be corrected by the House of Lords. In the present case, the words "no criminal prosecution," are about as plain as can be conceived, and the argument to induce us to override them is, that inasmuch as a private prosecutor must obtain leave to file an information by motion in open court; to require as a preliminary to such leave the written fiat of the Director of Public Prosecutions would be to restrain our discretion. If I could see that this was the case, I should be very unwilling to limit our discretionary powers. But I cannot think that the argument is well founded. The preliminary condition —the fiat of the Director of Public Prosecutions—must be obtained before we are asked to exercise our discretion, and I fail to see that this prevents us from exercising it.

Before the passing of the Act of William & Mary informations such as this were granted by the Master of the Crown Office simply upon payment of certain fees. The Act was passed for the purpose of restraining the Queen's Coroner in the exercise of this privilege, and was therefore, in one sense, a restraint upon granting them. Why is it unreasonable to suppose that a further restraint should be put on private prosecutors?

There may also be good reasons for requiring the prosecutor in the first instance to go before the Director of Public Prosecutions. This official may, if he pleases, institute an inquiry into the merits of the application, and may have at his disposal means of investigation which this Court would not possess upon the hearing of an ex parte application. I see no difficulty in deciding what is the commencement of the prosecution. The prosecution is

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commenced when the first step is taken by the prosecutor—that is, on applying for the rule. It is therefore necessary to obtain the fiat of the Director of Public Prosecutions before application is made to this Court.

I am of opinion that this rule ought to be made absolute.

Rule discharged.

Solicitors for prosecutor: *Horns & Murray.*
Solicitors for defendant: *Lewis & Lewis.*

A. P. S.

June 18.

[IN THE COURT OF APPEAL.]

COVENTRY, SHEPPARD & CO. *v.* THE GREAT EASTERN RAILWAY COMPANY.

Estoppel—Negligence—Proximate Cause—Railway Company—Delivery Order.

The defendants received a consignment of wheat and issued a delivery order for it, which came into the hands of B. Upon this delivery order B. obtained advances from the plaintiffs. Shortly afterwards the defendants issued a second delivery order in respect of the same consignment of wheat. The two delivery orders were different, and such as might be reasonably supposed to relate to distinct consignments of wheat. Upon this second delivery order B. obtained further advances from the plaintiffs, who were under the belief that the delivery orders related to distinct consignments of wheat. B. having afterwards become insolvent:—

Held, that the defendants were estopped by their negligence from shewing that the two delivery orders related only to one consignment of wheat, and that they were liable to compensate the plaintiffs for the loss sustained by them through the advances to B.

ACTION to recover the amount of certain advances made to Bowden & Co.

At the trial before Pollock, B., the following facts were proved:—The plaintiffs were corn factors and corn merchants in the city of London. On the 12th of December, 1881, Bowden came to the plaintiffs and asked for an advance of money. He produced a delivery order signed by certain persons trading as Birkett, Sperling, & Co., dated on that day, and addressed to the defendants, directing them to deliver to Bowden 150 sacks of wheat from Seagrave contained in certain trucks with numbers,

"as per orders lodged." On the faith of that document the plaintiffs made advances to Bowden, and the delivery order was sent to, and lodged with, the defendants on the 13th of December, and they accepted it. On the 14th of December, Bowden came to the plaintiffs with another delivery order made out on a form of the defendants and printed at the foot of the advice note. The commencement of the advice note, which was addressed to Bowden, was in the following terms: "Dated December 13th. The undermentioned grain consigned to you having arrived at this station, I will thank you for instructions as to its removal hence as soon as possible, as it remains here to your order, and is now held by the company not as common carriers but as warehousemen." The grain was described as coming from Seagrave, and as consisting of 151 sacks of wheat. The numbers of the trucks were not apparently identical with the numbers of those containing the 150 sacks above mentioned. Bowden filled up the delivery order with the plaintiffs' name, and they thereupon made further advances to him. That order was lodged with the defendants, together with a letter of the same date (13th December) addressed to them and signed by the plaintiffs, and this delivery order also was accepted by the defendants. Afterwards Bowden became insolvent. In January the plaintiffs found it necessary to realize these securities, but when they tried to sell the wheat they were informed by the defendants that there was only one parcel, and that it was a mistake on their part to accept the second delivery order. Upon taking the account between the plaintiffs and Bowden, in respect of the advances made to him, it was found that a balance of 113*l.* was due to the plaintiffs, which they sought to recover in this action.

The defendants alleged that an advice note of the 9th of December, which was only preliminary, and was marked "account to follow," was sent to Bowden as the consignee of the wheat from Seagrave; that advice note was transferred by him to Birkett. Sperling & Co., and the defendants agreed to hold to their order. This document never came to the plaintiffs' knowledge. On the 12th of December, Birkett, Sperling & Co. instructed the defendants to deliver the goods to Bowden, as has been already mentioned. Upon the document of the 13th of December the words "charges

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only" were written at the top and across it, and it was intended by the defendants to be merely an account of the charges. At the foot of the document of the 13th of December, 1881, were the following words: "Notice, please sign the under mentioned order, without which the goods cannot be delivered by the Great Eastern Railway Company. Please deliver the above mentioned goods to Coventry, Sheppard, & Co., or bearer. Bowden & Co." It was indorsed "Coventry, Sheppard, & Co."

POLLOCK, B., was of opinion that the advice note amounted to an admission by the defendants that they held the grain at the disposal of the consignees, and that the plaintiffs were entitled to say that the documents must be taken as representing goods actually in the defendants' possession. He gave judgment for the plaintiffs for 113*l.*, the case having been tried without a jury.

The defendants appealed.

June 9, 18. *Forbes, Q.C.*, and *French*, for the defendants. The alleged estoppel in the present case arises upon the supposed negligence of the defendants in improperly sending out the advice-notes; but *Carr* v. *London and North Western Ry. Co.* (1) is in point, and shews that the defendants have not been guilty of such negligence as to estop them from stating the truth. The defendants made no representation of fact, and therefore they are not liable to an action: *Farmeloe* v. *Bain.* (2) The act of the defendants was not the proximate cause of the injury sustained by the plaintiffs, and the defendants did not neglect any duty owing either to the plaintiffs or to the general public: *Arnold* v. *Cheque Bank.* (3) Mere carelessness in conducting their business would be insufficient to render the defendants liable: *Dickson* v. *Reuter's Telegram Co.* (4) The defence to this action may be rested upon two grounds: first, the defendants did not intend that the advice-notes and delivery orders should be acted upon: these documents are not negotiable instruments;

(1) Law Rep. 10 C. P. 307.
(2) 1 C. P. D. 445.
(3) 1 C. P. D. 578.
(4) 3 C. P. D. 1.

they are not like bills of lading or iron warrants: *Merchant Banking Co.* v. *Phœnix Bessemer Steel Co.* (1); secondly, the defendants had no reason to suppose that any fraud would be perpetrated.

Finlay, Q.C., and *Albert Gray*, for the plaintiffs. By the defendants' negligence the plaintiffs were misled into advancing money to Bowden, for owing to the advice-notes and delivery orders they were induced to rest satisfied and to abstain from making inquiries; and this is sufficient to render them liable: *Knights* v. *Wiffen.* (2) These advice-notes are plainly documents upon which advances of money may be easily obtained: the defendants ought to have contemplated that if they were guilty of negligence a dishonest use might be made of the advice-notes.

French, in reply. The doctrine as to estoppel is never to be applied without necessity, for "estoppels are odious," per Bramwell, L.J., in *Baxendale* v. *Bennett* (3), and here there is no reason for holding that an estoppel has been created against the defendants.

BRETT, M.R. This judgment must be affirmed. It can be upheld only on the ground of estoppel, that is, that the defendants were prevented by their own conduct from relying upon the fact that there were not two parcels of goods. There was one parcel which the defendants were bound to deliver to Bowden & Co. On the 13th of December they sent to Bowden & Co. a document couched in a certain form, and stating that certain goods had arrived and were subject to their orders; and there was a memorandum—"Notice, please sign the undermentioned order, without which the goods cannot be delivered." If I had had to construe that document, I might have felt doubt whether the delivery was to be made to a servant or not; but I should not have felt much doubt. Now I have the means of ascertaining what is the truth by finding out how the company have dealt with the documents. As to the document of the 9th of December, Bowden & Co. indorsed it in blank, and handed it to Birkett, Sperling, & Co., who gave notice to the defendants to hold the goods for them. This notice of course was not sent

(1) 5 Ch. D. 205. (2) Law Rep. 5 Q. B. 660.
(3) 3 Q. B. D. 525, at p. 529.

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to persons who were mere carriers; the railway company undertook to hold the goods for Birkett, Sperling, & Co. It was intended that there should be a delivery not to a mere servant, but to some person who should buy the grain for himself. Birkett, Sperling, & Co. indorsed to the plaintiffs. The conduct of the defendants shewed that they undertook to deliver to those persons, to whom the document should be handed over. As to the order of the 13th of December, the defendants acted similarly; they did not treat it merely as an invoice. The plaintiffs advanced money upon the faith of the document: they took the delivery order as a security upon which they might advance money: the second document was treated as an admission that the defendants were holding other goods: the plaintiffs advanced the money because the document was presented to them. The question is as to the second document. It is an undertaking. The question is whether the facts of this case are brought within any of the recognised doctrines as to estoppel. In *Carr* v. *London and North Western Ry. Co.* (1) certain propositions were laid down as to estoppel: one of them, that as to negligence, will govern this case. Now, were the defendants guilty of culpable negligence? Might the plaintiffs reasonably suppose that the document, upon which the defendants themselves had acted, had been correctly drawn up? It is true that there can be no negligence, unless there be a duty; but here the documents have a certain mercantile meaning attached to them, and therefore the defendants owed a duty to merchants and persons likely to deal with the documents.

Then was the negligence of the defendants the "proximate" cause of the loss sustained by the plaintiffs? I use the expression "proximate cause" as meaning the "direct and immediate cause." Here the production of the document was the "direct and immediate" cause of the advance of money to Bowden & Co. by the plaintiffs. And certainly the negligence of the defendants was to the prejudice of the plaintiffs and allowed the fraud to be perpetrated upon them. It seems to me, therefore, that the defendants are estopped as against the plaintiffs, their negligence having been the immediate cause of the advance. I do not

(1) Law Rep. 10 C. P. 307.

think that the acceptance of the delivery order is a ground of estoppel in this case, because at that time the money was already advanced. We are here judges both of law and of fact, and I am of opinion that the money was irrecoverably lost when it had been advanced to Bowden & Co. But the acceptance of the document is fatal to the defendants as shewing that they elected to treat it as a delivery order; and it is the strongest piece of evidence that they so acted as to entitle persons to believe that they would deliver the wheat when the proper document should be presented to them. The documents issued by the company are not negotiable instruments, and do not pass the property; but the defendants are estopped from denying the plaintiffs' right to the sacks of grain claimed by them. The judgment was right, and the appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. The plaintiffs did advance money on the faith of the document presented to them; it contained a statement as to the arrival of the goods and a form of order. It may be said that the document was only an intimation to men of business, and not a representation to be acted on; but the plaintiffs did not so understand it; as a matter of fact they were not negligent in not seeing that the document related to the same quantity of goods. It may be said that it is not proved that the documents were treated as delivery orders; but we must look at the facts, and it will be seen from them that the plaintiffs acted upon the documents presented to them. The form of the documents distinguishes this case from *Carr* v. *London and North Western Ry. Co.* (1) The documents are of a different kind. Certain recognised propositions were laid down in *Swan* v. *North British Australasian Co.* (2) and *Carr* v. *London and North Western Ry. Co.* (1) The present case falls within these recognised principles. The judgment was right, and the appeal must be dismissed.

FRY, L.J. I am of the same opinion. I think that there was some evidence of a custom to sell or pledge goods upon the faith

(1) Law Rep. 10 C. P. 307. (2) 7 H. & N. 603; 2 H. & C. 175.

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of a document of this kind. Then was there any duty upon the railway company to take care? I think that they were bound to take reasonable care. The documents which are material are those of the 9th and 13th of December. Now the dates are most important; they are different, and therefore the rules of the company would have a different application. There was nothing to shew that the documents related to the same goods except the word "charges" written across the second document; the second document requires a signature before the goods can be delivered, and it would be very strange if two signatures should be required for the same lot of goods. The documents were so different, that it could not reasonably be supposed that they related to the same lot of goods.

Then was the negligence of the defendants the proximate cause of the loss sustained by the plaintiffs? Here the second document was carelessly issued, and upon that the loss must be taken to have been sustained.

Appeal dismissed.

Solicitors for plaintiffs: *Stibbard, Gibson, & Co.*
Solicitor for defendants: *W. F. Fearn.*

J. E. H.

June 12.

ALLEN AND ANOTHER *v.* COLTART & CO. AND OTHERS.

Ship and Shipping—Charterparty—Discharge of Cargo—Discharge in Dock as ordered "if sufficient water."

A charterparty provided that the ship should load with a cargo and proceed therewith to a port "to discharge in a dock as ordered on arriving if sufficient water, or so near thereto as she may safely get always afloat":—

Held, that the ship was only bound to discharge in the dock named if there was sufficient water there at the time the order was given.

FURTHER CONSIDERATION.

The facts and arguments sufficiently appear from the judgment.

May 29. *Russell, Q.C.*, and *French*, for the plaintiffs.
Crompton, Q.C., and *Bigham*, for the defendants Coltart & Co.
Henn Collins, for other defendants.

Cur. adv. vult.

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June 12. CAVE, J. In this case, which was tried before me at Liverpool, the plaintiffs, who are shipowners, sued the defendants for delay in taking delivery of goods shipped on board the plaintiffs' ship *Bridgewater* under a bill of lading of which the defendants were the holders.

On the 6th of November, 1880, the *Bridgewater* was chartered by the plaintiffs to Messrs. Knight & Co. of Quebec, under a charter which provided that the ship should load a cargo of timber at Quebec, "and being so loaded shall therewith proceed to Liverpool to discharge in a dock as ordered on arriving, if sufficient water, or so near thereunto as she may safely get always afloat, and there deliver the same as per bills of lading." The cargo was loaded and bills of lading were signed, which provided for the delivery of the cargo at the port of Liverpool "unto the order of the shipper or to his assigns, he or they paying freight for the said goods, dead freight and demurrage, if any may be shewn due, as per charterparty, conforming to all the conditions thereof with average accustomed." The ship arrived in the Mersey on the 16th of June, 1881, when the defendants Messrs. Robert Coltart & Co., who were the holders of two out of the five bills of lading, ordered her to the Canada Dock. The other defendants, who were the holders of the remaining three bills of lading, took no part in this order.

At the time when the order was given there was not sufficient water to enable the ship to enter the Canada Dock, nor was there sufficient water for that purpose until the 14th of July, and the ship went into the Morpeth Dock at Birkenhead, that being a proper course to take under the circumstances, and there remained until the 14th of July, when she was taken into the Canada Dock. When the ship first arrived in the Mersey the plaintiffs set up a claim to detain the cargo until payment of a sum claimed for the detention of the ship at Quebec for 103 days. This claim the plaintiffs afterwards abandoned, and the question disputed at the trial was whether this claim of the plaintiffs was the sole cause of the delay in the delivery, or whether there was a further delay after that claim had been abandoned, owing to any refusal by the defendants Messrs. Coltart & Co. to take delivery elsewhere than in the Canada Dock. Upon this question

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the jury found a verdict for the plaintiffs for 100*l.* against Messrs. R. Coltart & Co., and by my direction a verdict for the defendants Dempsey and Harrison.

At the trial Mr. Crompton, on behalf of Messrs. Coltart & Co., took certain points of law which it was agreed I should reserve for further consideration, and the jury were discharged on the terms that if the discussion of these legal points involved the determination of any question of fact which had not been submitted to the jury, I should have power to determine it.

The case was heard on further consideration on the 29th of May.

The first contention was that Messrs. Coltart & Co. had no property in the goods, as they only held the bill of lading to recoup themselves for advances they had made on the timber, and consequently were not liable as assignees of the bill of lading under 18 & 19 Vict. c. 8, s. 1, and in support of this contention *Burdick* v. *Sewell* (1) was cited. I am of opinion that this contention is well founded. I think that under the circumstances proved at the trial I ought to hold that the intention of Messrs. Knight & Co. and Messrs. Coltart & Co. was that the latter should hold the bill of lading and the timber merely as a security to recover the advances they had made, and that the intention of both parties in giving and receiving the indorsed bill of lading was not to pass the property in the goods to Messrs. Coltart & Co. but to enable them to obtain possession of the timber on its arrival in Liverpool, in order that they might have the security of the timber for their advances. It appears to me, however, that the plaintiffs are entitled to maintain this action quite independently of 18 & 19 Vict. c. 8. As far back as 1811 it was held in *Cock* v. *Taylor* (2) that where the master of the ship had contracted by bill of lading with the shippers to deliver goods to certain persons or their assigns, he or they paying freight for the same, the demanding and taking of such goods from the master by a purchaser and assignee of the bill of lading without the freight having been paid, was evidence of a new agreement by him as the ultimate appointee of the shippers for the purpose of delivery to pay the freight due for the carriage of such goods,

(1) 10 Q. B. D. 363. (2) 13 East, 399.

the delivery of which was only stipulated to be made to the consignees named in the bill or their assigns, he or they paying freight for the said goods. It is true that that decision only extends to the payment of freight, but that is because that was the only condition of delivery in the bill of lading there under consideration. The ground of the decision is that where goods are deliverable to the holder of a bill of lading on certain conditions being complied with, the act of demanding delivery is evidence of an offer on his part to comply with those conditions, and the delivery accordingly by the master is evidence of his acceptance of that offer. Thus, when the bill of lading stipulated on the face of it for the payment of demurrage, it was held that the taking of the goods under it by the indorsee was evidence of an agreement to pay the demurrage: *Stindt* v. *Roberts* (1). This case is explained by Parke, B., in *Young* v. *Moller* (2), as establishing that the receipt of the cargo by an indorsee of the bill of lading is evidence of an agreement to be bound by its terms, whatever they may be. Thus, in *Wegener* v. *Smith* (3), it was held that the acceptance of a cargo by the indorsee of the bill of lading, whereby the goods were deliverable to order "against payment of the agreed freight and other conditions as per charterparty," was a circumstance from which the jury might imply a contract on his part to pay demurrage stipulated for by the charterparty, notwithstanding his refusal at the time of receiving the goods to pay the demurrage. This case was expressly approved of and followed in *Porteus* v. *Watney*. (4)

Is there, then, evidence in this case on which I ought to find that Messrs. Coltart & Co. agreed to take delivery on the terms of the bill of lading? I am of opinion that there is. It seems to me that if the holder of a bill of lading under which he is entitled to the delivery of goods on certain terms, presents that bill of lading and demands delivery of the goods, he thereby primâ facie offers to perform those terms of the bill of lading on which alone the goods are deliverable to him. According to the evidence of Mr. Castle, which I do not find to have been contradicted, Mr. Coltart said he had a right to name the dock according

(1) 5 D. & L. 460.
(2) 5 El. & Bl. 755.
(3) 15 C. B. 285.
(4) 3 Q. B. D. 534.

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to the charterparty, and he had named the Canada Dock, and wanted delivery there. He named the Canada Dock, not because he refused to perform the conditions of the bill of lading, but because he conceived that under those conditions he was entitled to name the Canada Dock. It is true that at first the plaintiffs refused to accept Mr. Coltart's offer to fulfil the conditions of the bill of lading and take delivery; but the jury have found in effect that afterwards the plaintiffs were ready and willing to deliver on the terms of the bill of lading, and that there was a delay caused by the refusal of Messrs. Coltart & Co. to accept delivery elsewhere than in the Canada Dock. Having regard to this finding of the jury, I think I ought to come to the conclusion that there was an agreement between the plaintiffs and the defendants Messrs. Coltart & Co. that the former should give and the latter should take delivery under the terms of the bill of lading, and that there was a delay in such delivery by reason of the defendants Messrs. Coultart & Co. refusing to take delivery elsewhere than in the Canada Dock.

This brings me to the second question in the cause, which is, whether under the terms of the bill of lading Messrs. Coltart & Co. were justified in refusing to take delivery elsewhere than in the Canada Dock. If they were, they are entitled to judgment; if they were not, then the jury have found that they have broken their agreement to take delivery on the terms of the bill of lading, and have assessed the damages at 100*l*. Now, as I have said, the bill of lading introduces all the conditions of the charterparty, one of which is that the ship shall proceed to Liverpool to discharge in a dock as ordered on arriving, if sufficient water, or so near thereunto as she may safely get, always afloat. It is important to ascertain the meaning of the words actually used, and cases decided on the construction of charterparties containing different language are not of much assistance. The controversy in this case turns on the meaning and application of the words "if sufficient water," and one method of arriving at their force is to consider what the construction of the charterparty would be if they were absent. The cases of *Parker* v. *Winlow* (1); *Bastifell* v. *Lloyd* (2); and *Dahl* v. *Nelson* (3), were

(1) 7 E. & B. 942. (2) 1 H. & C. 388. (3) 6 App. Cas. 38.

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cited as establishing that where a shipowner undertakes to proceed to a wharf in a tidal harbour (which cannot be reached during the neap tides), or as near as he may safely get, and the ship arrives during the low tides, the master must wait for the higher tides, on the ground that his contract is to go to the wharf if in the ordinary course of navigation it can be reached, and that the shipowner takes on himself the risk of delay from the ordinary course of navigation. In the cases cited the ships could have got to the wharves to which they had contracted to go at ordinary spring tides, and the delay did not exceed ten days. In this case there were but two or three days in the month when the *Bridgwater* could have got to the Canada Dock, and the time between the giving the order and the first day when the vessel could get into the dock was twenty-six days. Assuming, however, for the purposes of this case that such a delay is one arising from the ordinary course of navigation, it is necessary to ascertain the effect of the words "if sufficient water." Mr. Crompton contended that they mean "if sufficient water in the ordinary course of navigation," or, in other words, that they mean nothing more than the words "always afloat" at the end of the clause. This construction, however, would give no other way of construing them than to put on them a meaning which shall restrict what would be the meaning of the clause if they were absent. It seems to me that they are introduced in the interest of the shipowner, and restrict the generality of the power to name a dock, that the obligation of the shipowner is to proceed to the dock named if there is sufficient water to enter the dock when the order is given, and that if there is not then sufficient water the ship is not bound to discharge in the dock named. It is contended that if this is the construction the shipowner would be justified in refusing to go to the dock if there were not sufficient water at the time, although there might be sufficient water in two or three days. The answer to that, I think, is, first, that if the construction I have put on the charterparty is the only one that gives any meaning to the words "if sufficient water," it is no answer to say that that construction might in certain cases be productive of hardship on the shipper; and secondly, that as the shipowner if he cannot get to the dock named must go as near

(1) meaning at all to the words "if sufficient water". I can see no

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thereto as he can safely get, always afloat, he would find it to his advantage to exercise his rights reasonably, and rather to wait two or three days than to insist on delivery being taken at some place where possibly the discharge might occupy a longer time, while the charterer, on the other hand, would find it to his interest if there was a convenient dock with sufficient water to name that dock rather than one to which the ship could not get without a delay of two or three weeks. For these reasons, I am of opinion that there must be judgment for the plaintiffs against the defendants Messrs. Coltart & Co., for the sum of 100*l.* assessed by the jury with costs.

Judgment was given for the other defendants at the trial.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Gregory, Rowcliffes, & Co.. for Hill, Dickenson, & Co., Liverpool.*

Solicitors for defendants: *Wynne & Son, for T. & T. Martin, Liverpool; and for Forshaw & Hawkins, Liverpool.*

A. M.

June 27.

[IN THE COURT OF APPEAL.]

THE MIDLAND RAILWAY COMPANY *v.* THE LOCAL BOARD FOR THE DISTRICT OF WITHINGTON.

Local Government Acts—Notice of Action—Action brought after Time limited by Statute—Money paid under Mistake of Fact—Money received for Plaintiff's use—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 264.

The defendants, under the Public Health Act, 1875, s. 150, gave notice to the plaintiffs, as adjoining owners, to pave a part of a road situate within the defendants' district. It was then believed by both the plaintiffs and the defendants that the road was not repairable by the inhabitants at large. The plaintiffs not having done the work, the defendants did it and charged the cost to the plaintiffs, who paid it. It was afterwards discovered that the road was repairable by the inhabitants at large, and therefore that the plaintiffs were not liable, as adjoining owners, to pave the road. The plaintiffs thereupon demanded back from the defendants the money paid by them as the cost of paving the part of the road; but the defendants refused to return it. The plaintiffs, thereupon, sued to recover it as money paid under a mistake of fact and as money received to their use; but the plaintiffs did not give the defendants notice of action,

and the action was commenced more than six months after the cost of paving the part of the road had been paid to the defendants:—

Held, that notice of action was necessary, and that the action was brought too late, and that the provisions of the Public Health Act, 1875, s. 264, applied.

Waterhouse v. *Keen* (4 B. & C. 200), and *Selmes* v. *Judge* (Law Rep. 6 Q. B. 724), followed.

ACTION to recover money paid under a mistake of fact, and money received for the plaintiffs' use.

The cause came on for trial before North, J., at the Summer Assizes, 1882, held at Manchester, when the following facts were proved:—

The plaintiffs were the owners and occupiers of certain land and premises adjoining Lapwing Lane within the defendants' district. About the 23rd of July, 1879, the defendants, as the urban authority for the district, addressed to the plaintiffs a notice requiring them to sewer, level, pave, flag, and channel the portion of Lapwing Lane (in the notice described as a street) from Burton Road to Palatine Road, within three calendar months. The notice was given by the defendants under the Public Health Act, 1875, s. 150. (1) The plaintiffs did not

(1) By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 150, "Where any street within any urban district (not being a highway repairable by the inhabitants at large), or the carriageway, footway, or any other part of such street, is not sewered, levelled, paved, metalled, flagged, channelled, and made good, or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting, adjoining, or abutting on such parts thereof as may require to be sewered, levelled, paved, metalled, flagged, or channelled, or to be lighted, require them to sewer, level, pave, metal, flag, channel, or make good, or to provide proper means for lighting the same, within a time to be specified in such notice.

"If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses."

Sect. 264. "A writ or process shall not be sued out against or served on any local authority, or any member thereof, or any officer of a local authority, or person acting in his aid, for anything done or intended to be done or omitted to be done under the provisions of this Act, until the expiration of one month after notice in writing has been served on such local

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comply with the provisions of the notice. The defendants thereupon themselves executed the work, and their surveyor apportioned the sum of 1146*l.* 4*s.* 7*d.* as the proportion to be paid by the plaintiffs. This sum was paid by the plaintiffs to the defendants on the 30th of October, 1880; at that time both the plaintiffs and the defendants believed that Lapwing Lane was not a highway repairable by the inhabitants at large. In the beginning of 1881 some of the other adjoining owners of Lapwing Lane disputed their liability to pay their proportions of the total cost of sewering, levelling, paving, flagging, and channelling Lapwing Lane, upon the ground that it was a highway repairable by the inhabitants at large, and upon summonses before justices the question was decided in their favour. In a letter dated the 13th day of April, 1881, and addressed by one of the plaintiffs' officials to the defendants' clerk, occurred the following passage: "If the board intend to let the judgment go without appeal, or if on appeal they are again defeated, I must ask for the return of the 1146*l.* 4*s.* 7*d.* paid in respect of this lane last October." On the 21st of April the defendants' clerk wrote: "In reply to your letter asking for return of the amount of the paving apportionment, I beg to inform you that the board will appeal against the recent decision." Ultimately the defendants' appeal came on to be

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authority, member, officer, or person, clearly stating the cause of action, and the name and place of abode of the intended plaintiff, and of his attorney or agent in the cause; and on the trial of any such action the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the notice so served; and unless such notice is proved, the jury shall find for the defendant.

"Every such action shall be commenced within six months next after the accruing of the cause of action, and not afterwards, and shall be tried in the county or place where the cause of action occurred, and not elsewhere.

"Any person, to whom any such notice of action is given as aforesaid, may tender amends to the plaintiff, his attorney, or agent, at any time within one month after service of such notice, and, in case the same be not accepted, may plead such tender in bar; and in case amends have not been tendered as aforesaid, or in case the amends tendered are insufficient, the defendant may, by leave of the Court, at any time before trial, pay into court under plea such sum of money as he may think proper; and if upon issue joined, or upon any plea pleaded for the whole action, the jury find generally for the defendant, or if the plaintiff be nonsuited or judgment be given for the defendant, then the defendant shall be entitled to full costs of suit, and have judgment accordingly."

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heard at quarter sessions on the 10th of August, 1881, and at the end of October following it was decided by the Court that Lapwing Lane was a highway repairable by the inhabitants at large, and the defendants' appeal was dismissed. The Court of Quarter Sessions agreed to grant a special case on a question of law for the opinion of the High Court of Justice, and on the 5th of November the defendants' clerk so informed the plaintiffs. The defendants in December decided not to proceed with the special case. The plaintiffs thereupon demanded a return of the sum of 1146*l.* 4*s.* 7*d.*, but repayment thereof was refused by the defendants. On the 2nd of February, 1882, the defendants were served by the plaintiffs with one month's notice of action to recover the sum of 1146*l.* 4*s.* 7*d.*, but the notice of action did not state the name of the solicitor or agents who would sue on behalf of the plaintiffs, and for the purposes of the argument and the judgment it was assumed that the notice of action was a nullity. The writ in the present action was issued on the 3rd of March, 1882.

For the defendants it was contended that the action would not lie, no valid notice of action having been given, and the action itself having been commenced more than six months after the 30th of October, 1880, when the money was paid by the plaintiffs to the defendants.

North, J., upon further consideration, was of opinion that it was settled by authority that notice of action was required, and that the action was brought too late, and gave judgment for the defendants.

The plaintiffs appealed.

June 26, 27. *Gully, Q.C.*, and *Samuel Taylor*, for the plaintiffs. In this case, the defendants took money from the plaintiffs under pretence that they were entitled by law to receive payment of it; therefore they were not entitled to any notice of action: *Irving* v. *Wilson.* (1)

[BRETT, M.R. The ground of the decision in that case was that the money was taken under circumstances rendering the whole transaction unlawful.]

The defendants may rely upon *Greenway* v. *Hurd* (2); but that

(1) 4 T. R. 485. (2) 4 T. R. 553.

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case appears to be distinguishable, for in it the receipt of the money appears in the first instance to have been lawful. In *Wallace* v. *Smith* (1) it was intimated by the Court of King's Bench that statutes requiring notice of action do not extend to actions of assumpsit. In the present case the defendants have done no act; they have simply failed to return the money wrongfully received by them; and this is insufficient to entitle them to a notice of action: *Umphelby* v. *M'Lean.* (2) The present plaintiffs did not pay the money under compulsion: *Waterhouse* v. *Keen* (3) was substantially a case of duress and not of contract; it was an illegal demanding of a toll; at all events, a tortious act had been committed. The plaintiffs sue to recover money paid under a mistake and money received for their use; this is an action of contract, the tort being waived, and it was admitted in the course of the argument in *Davies* v. *Mayor, &c., of Swansea* (4), that notice of action is not required before actions of contract.

[BRETT, M.R. In that case the contract was of a special kind.]

In *Davis* v. *Curling* (5) it was pointed out by Wightman, J., that actions for tort do not as regards notice of action stand upon the same footing as actions of contract or assumpsit; and the learned judge evidently considered that a clause authorizing "tender of amends" is very important in determining whether an enactment requiring notice of action ought to be confined to actions of tort. The Public Health Act, 1875, s. 264, authorizes the tender of amends, and this is conclusive in the plaintiffs' favour. *Newton* v. *Ellis* (6), and *Poulsum* v. *Thirst* (7), recognised in *Wilson* v. *Mayor, &c., of Halifax* (8), shew that the insertion of the words "omitted to be done" in the enactment, do not afford the defendants any greater protection than they would have enjoyed without them. Notice of action is not required where the plaintiff claims an injunction: *Flower* v. *Local Board of Low Leyton* (9), for the object of the injunction is to prevent

(1) 5 East, 115.
(2) 1 B. & A. 42.
(3) 4 B. & C. 200.
(4) 8 Ex. 808, at p. 812; 22 L. J. (Ex.) 297.
(5) 8 Q. B. 286.
(6) 5 E. & B. 115; 24 L. J. (Q.B.) 337.
(7) Law Rep. 2 C. P. 449.
(8) Law Rep. 3 Ex. 114.
(9) 5 Ch. D. 347.

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the occurrence of future injury, and the principle of that decision shews that s. 264 only extends to actions to recover compensation in damages for past injury. No case can be found in which it has been held that a notice of action is necessary in actions of contract, although, as the plaintiffs admit, notice of action is required under the Public Health Act, 1875, s. 264, in all actions to recover damages for a tort. The only authority, which really supports the argument for the defendants, is *Selmes* v. *Judge* (1); but even that was, in truth, a decision upon a case of quasi-tort; the surveyors might have proceeded summarily if they had not been paid. If the decision cannot be explained upon this ground, it is inconsistent with other decisions and cannot be upheld; it is not binding upon this Court.

As to waiver of notice of action and of the defence that the action has not been brought within six months, it appears plain that the plaintiffs did not proceed earlier owing to the defendants' appeal to the court of quarter sessions: it is clear from the correspondence that the defendants waived any technical defence under the Public Health Act, 1875, s. 264.

Ambrose, Q.C., and *Leresche* (*Heywood* with them), were not called upon to argue for the defendants.

BRETT, M.R. This action has been brought to recover back a sum of money paid by the plaintiff company to the defendants, who are a local board, and the payment is alleged to have been made under a mistake of fact. The question is, whether the plaintiffs are precluded from obtaining judgment by not having given notice of action and by not having sued within the time limited by statute. The defendants, being a local board, supposed that a certain road was a road of a particular kind; they proceeded to exercise certain rights which they supposed to belong to them: they gave notice to the plaintiffs to pave and sewer a certain portion of this road. The plaintiffs did not do the work; the defendants did the work and charged the plaintiffs with the cost, who paid it. The board supposed that they had been and were exercising rights conferred upon them by statute; for they had no rights except such as had been conferred upon

(1) Law Rep. 6 Q. B. 724.

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them by the legislature. The mistake was found out, and the plaintiffs demanded back the money paid by them: the defendants refused to comply, as I think, from a belief that they were acting under statutory powers.

It may be said that when the money was paid by the plaintiffs, it was paid pursuant to the statute, and that when the mistake was found out, the refusal to return the money took place under the statutory powers; and that in either case the action is too late. The question depends upon the Public Health Act, 1875, s. 264. Can an action of this kind be brought within this enactment, which requires notice of action and which allows only a limited time for taking legal proceedings? I incline to think that the draftsman of this section had his mind directed to actions of tort; it rather applies to actions sounding in damages; but the question is what is the meaning of the whole section? I am prepared to say that it applies to everything intended to be done or omitted to be done under the powers of the Act. It has been urged that the section does not apply when the action is for money had and received and the tort is waived. I think that view too narrow; and I am of opinion that wherever relief is sought in respect of anything done or omitted to be done under an intended exercise of the powers of this Act, this section applies. It has been contended that this is an action in contract, and that whenever an action is brought upon a contract, the section does not apply. I think that where an action has been brought for something done or omitted to be done under an express contract, the section does not apply; according to the cases cited an enactment of this kind does not apply to specific contracts. Again, when goods have been sold, and the price is to be paid upon a quantum meruit, the section will not apply to an action for the price, because the refusal or omission to pay would be a failure to comply with the terms of the contract and not with the provisions of the statute. It may be said that this is a case of implied contract: I think that argument fallacious: no contract was intended to be entered into; but where money was paid under a mistake of fact, the judges held that under the old forms of procedure it might be recovered back in an action quasi ex contractu. This is not a case where the parties intended to contract without

saying so in express terms. In *Waterhouse* v. *Keen* (1) it was held that notice of action was required, where a toll had been improperly asked for, and the demand had been for the time submitted to; that was not a case of implied contract. How can it be said that there was a consensus of minds as to whether the toll unlawfully taken should be returned? The decision does not shew that notice of action is required in the case of implied contract, properly so called. But here the question is, whether the defendants have acted under the Public Health Act, 1875. It is suggested that the use of the term "tender of amends" in s. 264, is decisive in favour of the argument for the plaintiffs: no doubt it is a matter worthy of observation. But I do not think that this expression is sufficient to outweigh other considerations. My judgment is not inconsistent with the decisions cited before us; and it is quite consistent with the reasons assigned in *Waterhouse* v. *Keen* (1); in that case the judges went into the facts of the case, and considered what was the real matter in issue. We cannot decide otherwise than we do without overruling *Selmes* v. *Judge*. (2) I cannot disagree with that decision: I think it right. The argument has been properly pressed upon us; but I think that the words "omitted to be done" were inserted in the Public Health Act, 1875, s. 264, in order to defeat, amongst others, the contention which has been addressed to us.

As to the question of waiver, it appears to me that only a question was asked: there was no mis-statement, and no misleading. There was a truthful answer: there was no implied undertaking, and no burden was cast upon the plaintiffs.

The judgment of North, J., was right, and this appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. We must examine the terms of the Public Health Act, 1875, s. 264, which raises the only defence necessary to be considered: that defence is that no notice of action was given, and the action is brought more than six months after the cause of action arose. The facts are simple: the defendants gave notice to the plaintiffs to do

(1) 4 B. & C. 200. (2) Law Rep. 6 Q. B. 724.

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certain work: as it was not done, the defendants themselves did it, and charged the plaintiffs with the cost; all acts were done bonâ fide, and it was supposed that all proceedings were legal: it was afterwards found out that the defendants had no right under the Public Health Act, 1875, to charge the plaintiffs with the cost. Do the plaintiffs sue for something "done or omitted to be done" under that statute? The action is for taking and keeping money: that is not an act which can be severed like a continuous trespass; nevertheless, it is an act "done" within the meaning of s. 264: upon its true construction the taking of money is an act "done." This view is strongly supported by *Waterhouse* v. *Keen* (1), and *Selmes* v. *Judge* (2), although upon a critical examination there may be a distinction between those decisions and the present case. Actions ex contractu and ex delicto may, as a rule, be very distinguishable; but it is sometimes difficult to say to which class a particular action belongs. The question is, did the defendants keep the money intending to act under the provisions of the Public Health Act, 1875? The answer must be clearly in the affirmative.

The defence arising under the Public Health Act, 1875, has not been waived; it cannot be said that the defendants' letter prevents them from setting up the defence allowed by statute: something far more definite must be adduced. It appears to me that North, J., was right, and his decision must be affirmed.

FRY, L.J. I can express my concurrence with the judgments of Brett, M.R., and Lindley, L.J., in a few words. The Public Health Act, 1875, s. 264, was meant to include everything done bonâ fide under the colour of the provisions of the statute. In the present case the plaintiffs complain of an unlawful taking of money under the statute, that is, a thing done under the statute; the defendants are within its protection. I feel myself supported in the conclusion at which I have arrived by the judgments in *Waterhouse* v. *Keen* (1), and *Selmes* v. *Judge* (2). Those cases are very much in point. It is said that previous decisions do not apply, because here no physical power has been put in

(1) 4 B. & C. 200. (2) Law Rep. 6 Q. B. 724.

force, such as distress or the like, and that only actions of tort are within the section. I think that a vicious argument, and I cannot follow it.

I need add nothing upon the point as to waiver.

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Appeal dismissed.

Solicitors for plaintiffs: *Beale, Marigold, Beale, & Groves.*

Solicitors for defendants: *Chester, Mayhew, Broome, & Griffiths for H. T. Crofton, Manchester.*

J. E. H.

[IN THE COURT OF APPEAL.]

May 28.

CASSABOGLOU *v.* GIBB AND OTHERS.

Principal and Agent—Foreign Commission Agent and his Principal—Goods consigned not of Description ordered—Measure of Damages.

The plaintiff, a merchant in London, gave orders to the defendants, commission agents in Hong Kong, to purchase for him a quantity of a certain kind of opium. No such opium could then be obtained at Hong Kong, but instead of informing the plaintiff of this fact, the defendants by mistake informed him that they could procure it, and they purchased and shipped to the plaintiff opium which they erroneously supposed to be such as was ordered, but which was really of an inferior description:—

Held, that the relation between the plaintiff and the defendants was not that of vendor and purchaser but of principal and agent, and that therefore the true measure of damages which the plaintiff was entitled to recover was not the difference between the value of the opium ordered and that shipped, but the loss actually sustained by the plaintiff in consequence of the opium not being of the description ordered.

APPEAL by the plaintiff from the decision of the Queen's Bench Division (Manisty and Williams, JJ.) directing judgment for the defendants on a special case. (1) The material facts as they appeared in the case were the following:—

The plaintiff is a merchant in London, and the defendants are commission agents at Hong Kong, having as their London agents Messrs. T. A. Gibb & Co., of Old Broad Street. On the 23rd of March, 1880, the plaintiff through the said London agents of the defendants inquired of them at what price they could buy ten

(1) 9 Q. B. D. 220.

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cases of the finest "dry new crop Persian opium." The defendants having in reply to this stated the price at which they could buy, the plaintiff on the 25th of March, 1880, ordered them to buy for his account ten cases of the finest dry new Persian opium and to have them shipped by the first mail steamer, and on the 30th of March the plaintiff ordered the defendants to purchase for him twenty more cases of the same drug, and the defendants afterwards purchased for the plaintiff and shipped thirty cases of what they erroneously believed to be finest dry new crop Persian opium. In April the plaintiff was advised by the defendants that his orders had been executed, and that they had drawn bills on him for the price of the opium with their commission in respect of the said agency. These bills were duly paid by the plaintiff at maturity.

Upon the arrival of the opium in London it was found that no part of it was in accordance with the description ordered, and the plaintiff immediately rejected and refused to accept the said thirty cases, and twenty of them were sold on account of those concerned at a lower price than the plaintiff had paid for them. The other ten cases had been resold by the plaintiff before arrival to other parties, who in consequence of the opium being of a different description to that ordered made a claim on the plaintiff for damages, in respect of which the plaintiff was compelled to pay 170*l.* 14*s.* 6*d.*

It was admitted for the purpose of this case that there was in fact no such fine new crop Persian opium to be then obtained at Hong Kong as was ordered, but that the plaintiff was never informed by the defendants of that fact.

The plaintiff claimed to be paid by the defendants the difference between the market price of the article and the proceeds of the sale of the drug actually sent as damages for defendants' alleged breach of contract, or alleged negligence as such agents.

The defendants paid into court 300*l.*, and the plaintiff admitted that if the defendants were only liable to made good the loss actually incurred by him in consequence of the defendants' breach of duty (including the said 170*l.* 14*s.* 6*d.*) that sum was sufficient to satisfy his claim.

The question for the opinion of the Court was, whether the

plaintiff was entitled to recover from the defendants any damages beyond the amount paid into Court.

The Queen's Bench Division, having held that he was not, directed judgment to be entered for the defendants. The plaintiff appealed.

Pollard, for the plaintiff. The plaintiff is entitled to the same amount of damage as he would have been if the relation between him and the defendants had been that of vendor and purchaser. It may be that he is not entitled to recover for the loss of profit he might have made on a resale, but he was entitled to have the article he had ordered, and therefore to damages which would put him in the same position he would have been in if the article ordered had been sent.

[BRETT, M.R. That would depend on whether the plaintiff could have gone into the market and bought as against the defendants.]

Perhaps that might be so. A principal can sue his agent for nonfeasance or misfeasance. The question is whether when a foreign agent has purchased goods for his principal and shipped them, the position of the agent to his principal is not that of vendor and purchaser. *Feise* v. *Wray* (1) shews that he is so far a vendor that on the bankruptcy of his principal to whom he had shipped the goods he may stop the goods in transitu. In *Ireland* v. *Livingston* (2) Lord Blackburn, then Blackburn, J., says, "It is quite true that the agent who in thus executing an order ships goods to his principal is in contemplation of law a vendor to him. The persons who supply goods to a commission merchant sell them to him and not to his unknown foreign correspondent and the commission merchant has no authority to pledge the credit of his correspondent for them . . . . and just so does the property in the goods pass from the country producer to the commission merchant; and then, when the goods are shipped, from the commission merchant to his consignee. And the legal effect of the transaction between the commission merchant and the consignee who has given him the order is a contract of sale passing the property from the one to the other; and consequently the commission merchant

(1) 3 East, 93.

(2) Law Rep. 5 H. L. 395, at p. 408.

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is a vendor and has the right of one as to stoppage in transitu." In his work on Contract of Sale, pp. 212 to 214, Lord Blackburn reviews the cases of *Feise* v. *Wray* (1), *Siffken* v. *Wray* (2), and *Tucker* v. *Humphrey* (3), and says, "It seems that in cases where a factor acting for a foreign correspondent purchases goods in his own name and on his own credit it is rather too qualified a phrase to say merely that he stands in the situation of vendor quoad the consignee. If he is not vendor it is difficult to say who is, as there would be much difficulty in establishing any privity of contract between the foreign correspondent and the original vendors." Story on Agency, s. 350, in like manner treats a factor in a foreign country who purchases goods on his own credit for his principal and ships them to the latter as one having the rights and remedies and being in the same predicament as a vendor of the goods. In *Turner* v. *Liverpool Dock Trustees* (4) it was assumed that the relation of vendor and purchaser existed between the foreign commission merchant and his principal in this country.

[BRETT, M.R. How do you apply that principle here? Do you contend that the measure of damages is the difference between the contract price and the market price? If so there was here no contract price.]

There was the cost price. The plaintiff is entitled to be placed in the position he would have been in if the defendants had fulfilled their contract and bought the opium which was ordered: Mayne on Damages, 2nd ed., 415, citing *Bell* v. *Cunningham* (5). In that case an agent at Leghorn was directed to invest money he had of his principal in tiles, and to ship the cargo for Havana, and it was held that on a breach of the contract by the agent to do so the damages might be estimated according to the value of the tiles at Havana, though an estimate was not to be made of possible profits from the sale of the tiles.

Cohen, Q.C., and *Anstie*, for the defendants. What was the contract or obligation which the defendants had entered into? They were employed by the plaintiff as commission agents to

(1) 3 East, 93.
(2) 6 East, 371.
(3) 4 Bing. 516.
(4) 6 Ex. 543; 20 L. J. (Ex.) 393.
(5) 3 Peters, 69.

buy certain opium. In some cases it may be true that an agent may be considered with reference to his principal as in the position of a vendor; but in the present case there was no contract by the defendants that the plaintiff should have the opium, at all events, whether it could or could not be procured at Hong Kong. The breach of duty on the part of the defendants was in shipping the opium which they shipped, and in not informing the plaintiff that they could not procure for him at Hong Kong the opium he had ordered. Then what are the damages for such breach of duty? The plaintiff seeks to be placed in a better position than he would have been in if the defendants had performed their duty, and had therefore informed him that they could not procure the opium he directed them to get. He cannot claim the profits he might have made if the defendants had procured and shipped the opium which was ordered. The measure of damages for the violation of the agent's duty which the principal is entitled to claim is the actual loss he has sustained by what the agent has done or omitted to do: Mayne on Damages, 2nd ed., p. 411, and Sedgwick on Damages, p. 693. Though as regards the right of stoppage in transitu and for some purposes a foreign commission agent who has purchased and shipped goods for his principal may be considered to be in the position of a vendor, there is no case in which it has been decided that damages for breach of any duty on his part are to be assessed on the same principle as they are in the case of a vendor and purchaser. The plaintiff is really seeking here to recover the profit he might have made if he had received the particular kind of opium he had ordered the defendants to buy. Such damages are not the direct loss he has sustained, but speculative damages which the American case of *Short* v. *Skipwith* (1), and also even *Bell* v. *Cunningham* (2), shews ought not to be given.

Pollard, replied.

BRETT, M.R. This case has arisen out of a contract between the plaintiff and defendants, which was a contract of principal and agent, the plaintiff being a merchant in London, and the defendants agents abroad. The contract was that the defendants

(1) 1 Brock. 103. (2) 3 Peters, 69.

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as agents of the plaintiff should buy for him a certain description of opium of merchants abroad, and ship it to him in England. Now, duties would necessarily be imposed on persons who acted as such agents besides that of buying the opium at the lowest price, and afterwards shipping it. It would be their duty if they could not buy such opium to inform their principal of that fact, and if they sent information respecting what they could buy, it was their duty to send correct information, and if they did not do so, but sent information which was wrong, it would be a breach of duty on their part. The defendants did not buy the opium which was ordered, and it is to be taken as an admitted fact, for the purpose of this case, that they could not do so, as there was none such to be obtained at Hong Kong. There would be therefore no breach of contract on their part in not buying it; for as agents they had only undertaken to buy it if they could do so. But they omitted to inform the plaintiff that they could not buy this opium, and in respect of such omission there was a breach of duty, though it does not appear that it produced any damage to the plaintiff. The defendants, however, without using sufficient care, gave the plaintiff wrong information as to the description of the opium they had purchased and shipped for him; and, further, they drew bills on the plaintiff for the price of the opium and for their commission as agents. Now, the opium which was so shipped was not of the description ordered. Before its arrival the plaintiff, on the faith of the information which the defendants had given him, had made a contract for the sale of a portion of it to other parties, who afterwards made a claim on him because it was found to be of a different and inferior description to that ordered of the defendants, and on that account the plaintiffs had to satisfy such claim by the payment of a sum of 170*l.* 14*s.* 6*d.* The rest of the opium the plaintiff rejected on its arrival, and sold it for the benefit of all concerned, as he had a right to do, inasmuch as it was not of the description he had ordered. Then the question is, under these circumstances, what is the rule as to the measure of damages to which the plaintiff is entitled? He is entitled, I think, to the damage he has suffered by reason of the defendants' breach of duty, subject to the rule that such damage must not be too remote. He is entitled, therefore, to

recover back the money he paid the defendants, and also the further sum of 170*l.* 14*s.* 6*d.*, which he paid by way of damages to the purchaser to whom he had resold a portion of the opium, as that last was a loss he sustained by reason of the defendants' breach of duty. The plaintiff was also put to some further expenses, but it is admitted by him that the defendants have paid into Court a sum sufficient to cover not only these but all the other moneys he has so had to pay. It is argued, however, on the part of the plaintiff, that he is entitled to recover more than such moneys, as he has sustained a loss or damage which is not included therein, for if the defendants had fulfilled their contract he would, it is said, have got something which he has not now got. The argument really comes to this, that if the opium shipped by the defendants had been as described by them, and had so arrived, then as the market price went up, he the plaintiff would have made a profit, and it is in fact the loss of that profit which the plaintiff seeks to recover, although Mr. Pollard endeavoured not to say so. Mr. Pollard said that the plaintiff was entitled to recover what he was claiming because the contract between him and the defendants, although originally a contract of principal and agent, had become or was like that of vendor and purchaser, so that the rule as to damages which was to be applied was as if the contract were that of vendor and purchaser. But that rule is applicable only to the case of a non-delivery of goods and not to such a case as the present. Mr. Pollard cited, however, in support of his contention, the authority of Lord Blackburn, in his work on Sales, at page 214, and in the case of *Ireland* v. *Livingston* (1), and on a question relating to agency he could not have cited a higher authority; but Lord Blackburn has not said that as long as the contract of principal and agent is executory the principal can sue the agent and make him pay as though the contract were that of vendor and purchaser. He has considered the point with reference to two matters; one with regard to the theory of passing the property in the goods, and the other as to the power of stopping the goods in transitu, and as to those two matters, he has said with reference to the first

(1) Law Rep. 5 H. L. 395.

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of them, that if the foreign commission agent has purchased the goods which he was ordered to purchase, and has put them on board consigned to his principal, by that appropriation the property in the goods passed from the commission agent to the principal as if such agent were a vendor. Then as regards the power to stop in transitu, Lord Blackburn has said that if the commission agent abroad is bound to pay for the goods to the foreign seller of whom he bought them, and if after he has shipped them to his principal, such agent has not been paid, and his principal is insolvent, so that the foreign seller could only have the agent to look to for payment, the Courts have held that such agent may stop the goods in transitu as if he were a vendor, or in the position of a vendor. And that that is how it is understood is pointed out in Benjamin on Sales, 2nd ed., p. 689, where it is said "stoppage in transitu is so highly favoured on account of its intrinsic justice, that it has been extended by the Courts to quasi vendors, to persons in a position similar to that of vendors." But it is only said that the commission agent is to be as if he was a vendor when he has bought for his principal the goods which were ordered, which was not the case here. I asked Mr. Pollard how he applied such a rule as that to the present case, because the measure of damages in the case of a vendor and purchaser would be the difference between the market price and contract price at the time of the breach, and the only answer he gave me was that the plaintiff was entitled to be placed in the same position he would have been in if the defendants had fulfilled their contract with him. In fact, he did not answer my question, because he could not do so, for it was impossible to say when was the time of the breach at which the difference between the contract price and market price should be ascertained. It is obvious to my mind that the contract of principal and agent is never turned into a contract of vendor and purchaser, for the purpose of settling the damages for the breach of duty of the agent. It is not necessary that I should give any opinion, and I therefore refrain from doing so, as to what would be the measure of damages if opium could have been bought at Hong Kong of the description ordered, because in fact no such opium could

have been bought. Here all that the plaintiff can be entitled to recover has been paid into Court, and, therefore, this appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. In order to understand the case it is necessary to bear in mind that the plaintiff ordered the defendants at Hong Kong to buy for his account a certain quantity of the finest dry new Persian opium, and that the fact was, which is an important fact, that the defendants could not possibly obtain for the plaintiff that description of opium, as there was none such at Hong Kong. The defendants therefore did no wrong, and committed no breach of duty in not getting the opium of the class ordered. What was wrong and a breach of duty on the part of the defendants was that by some blunder they bought for the plaintiff opium of a different description, and informed him that they had got the opium he had ordered. What damage was it then which the plaintiff suffered by that breach of duty on the part of the defendants? The plaintiff paid the defendants the price of the opium, and he is entitled of course to have that returned to him. He also resold before their arrival ten of the cases of opium, and became liable to make compensation to the purchasers of these in consequence of the opium being of a description different from that ordered. For that consequential damage the defendants are liable, but they have paid into Court a sum sufficient not only to cover that, but the price the plaintiff paid for the opium, and the expenses he incurred. The plaintiff, however, wants more; he wants to be indemnified on the footing that the defendants ought to put him in the same position he would have been in if they had shipped the opium which he had ordered; in other words, the plaintiff wants to recover the difference between the price he paid for it and the market value of the opium which he ordered. It is said on the part of the plaintiff that the defendants, who were agents instructed to buy, were in the position of vendors, but I cannot agree to that, and in my opinion the defendants have indemnified the plaintiff for all the loss which was really the result of their breach of duty, and that therefore this appeal must be dismissed.

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FRY, L.J. In this case the plaintiff asks to assess damages for what was the difference between the contract price and the market price of the opium, and he does so on two grounds: first, on the ground that there was such a contract as created the relation of vendor and purchaser; and secondly, that whether there was such a contract or not, the measure of damages he asks to have is the true one. Now as to the first of these grounds, was there such a contract? was the contract of principal and agent merged into that of vendor and purchaser? This must be a question of fact, and as a matter of fact there was no such contract. It is said, however, that there must be such a contract inferred for two reasons, first, because otherwise the property in the goods would not pass to the English merchant for whom the agent abroad bought them. In my judgment the property would pass. If the article was specific it would pass by the purchase, and if not specific, but was appropriated by the agent for his principal, it would pass by virtue of the appropriation. The other reason for inferring the relation of vendor and purchaser was said to be because the foreign agent who has bought for his principal has the right of stoppage in transitu, but that, in my opinion, is no reason for such inference. Since the leading case on the subject, namely, that of *Lickbarrow* v. *Mason* (1), the person who stops goods in transitu must be a consignor, but there are numerous cases in which the right has been allowed of stopping in transitu without the relationship existing of vendor and purchaser. This right to stop in transitu is explained by Lord Abinger in *Gibson* v. *Carruthers* (2), and whether founded on some principle of common law or of equity as discussed by Lord Abinger in that case, it is a right which the Courts have given effect to as a just and equitable right. The first case on the subject, namely, that of *Feise* v. *Wray* (3), was cited to shew that in the case of the foreign agent buying for his English principal there is the relationship of vendor and purchaser, but Grose, J., there says, "What is this but the plain and common case of the consignor of goods who has not received payment for them stopping them in transitu before they get to the hands of

(1) 1 Sm. L. C. 8th Ed. 753.
(2) 8 M. & W. 321.
(3) 3 East, 93.

the consignee? It is said that no such right exists in the case of a factor against his principal. If this were a case of factor and principal merely, I should find difficulty in saying that it did;" and Le Blanc, J., says, "For the purpose thus of stopping the goods in transitu they stood in the relative situation of vendor and vendee, though perhaps not so as for all purposes." In *Falk* v. *Fletcher* (1) Willes, J., says, "The fact of the plaintiff being agent for De Mattos is no doubt a circumstance that is not to be lost sight of. But in the sense of being the person who put the goods on board he is in the same condition as if he had been an ordinary unpaid vendor. For this the case of *Feise* v. *Wray* (2) is an authority, though that was a case of stoppage in transitu." Then in *Ireland* v. *Livingston* (3) Cleasby, B., says that there was there "not a mere contract between vendor and purchaser, although after the goods were shipped a relation like that of vendor and vendee might arise." No doubt in that case Lord Blackburn uses stronger language, and says that "the legal effect of the transaction" "is a contract of sale passing the property from the one to the other, and consequently the commission merchant is a vendor and has the right of one as to stoppage in transitu;" but by the legal effect of the transaction he means the legal effect of an analogous contract to that of a contract of purchase and sale. It is important also to observe that Lord Chelmsford in that case puts the matter so as to exclude the existence of any contract of purchase and sale. He says, "I would preface what I have to say by stating my opinion that the question is to be regarded as one between principal and agent, though the plaintiffs might in some respects be looked upon as vendors to the defendants, so as to give them a right of stoppage in transitu." Therefore in such a case as the present there is in fact no contract of vendor and purchaser. If that be so, then is the principle on which the damages are to be assessed to be governed by that which is applicable to the case where there exists such a contract? I think not, and that it is to be governed rather by that which is applicable to the case of principal and agent. I have nothing further to add to what has been said by

(1) 18 C. B. (N.S.) 403; 34 L. J. (C.P.) 146. (2) 3 East, 93.
(3) Law Rep. 5 H. L. 395.

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the other members of the Court. In my opinion the plaintiff has suffered no damage beyond the sum which the defendants have paid into Court, and therefore this appeal ought not to succeed.

Appeal dismissed.

Solicitors for plaintiff: *Paines, Layton, & Pollock.*
Solicitors for defendants: *Flux & Leadbitter.*

W. P.

April 28.

[IN THE COURT OF APPEAL.]

CLEMENTS *v.* MATTHEWS.

Bill of Sale—Assignment of future Crops—Landlord and Tenant—Surrender—Rights of Bill of Sale Holder against Landlord of Grantee.

B., the tenant of a farm, by bill of sale made in September, 1880, assigned to the plaintiff his stock-in-trade and effects on the farm, together with all the growing and other crops "which at any time thereafter should be in or about the same or any other premises" of the said B. On the 25th of April, 1881, the defendant, who was B.'s landlord of the farm, distrained for rent, and afterwards agreed with B. to withdraw the distress and to forego all claim for rent on B. agreeing to give up possession and surrender the tenancy to the defendant on the 24th of June then next. The defendant accordingly withdrew the distress, and on the 24th of June he took possession of the farm according to the agreement, and afterwards cultivated the crops which were growing there, and when they arrived at maturity he reaped and sold them. Between the time he withdrew the distress and the time he took possession of the farm, viz., on the 19th of May, the defendant had notice for the first time of the plaintiff's claim under the bill of sale to the growing crops. The amount of rent which would have been due to the defendant had the tenancy continued, and the expenses he incurred in cultivating and reaping the crops, exceeded their market value when sold:—

Held, in an action by the plaintiff against the defendant for the value of these crops, that the description in the bill of sale of the future crops on the farm was sufficiently specific to make a valid assignment of them in equity.

Held, also, that, assuming that the plaintiff had a right in equity to such crops as against the defendant, yet that such right was subject to the payment of the rent and of the expenses of cultivating and reaping the crops, and as such rent and expenses exceeded the value of the crops the plaintiff had not been injured, and had no cause of action against the defendant.

ONE James Baggs, who was tenant to the defendant from year to year of High House Farm, Preston-on-Wye, in the county of

Hereford, on the 22nd of September, 1880, executed a bill of sale of that date, by which he assigned to the plaintiff by way of mortgage for securing the repayment with interest of a loan of money, all the furniture, fixtures, &c., stock-in-trade, live and dead stock, growing and other crops, and all other his goods, chattels, and effects then being in and about the dwelling-house, yards, fields, buildings, and premises of him the said J. Baggs "known as High House, Preston-on-Wye, together with all other furniture, fixtures," &c., "live and dead stock, growing and other crops and other goods, personal chattels and effects whatsoever, which at any time thereafter should be in or about the same or any other premises of the mortgagor" (the said J. Baggs), "whether brought there in substitution for, renewal of, or in addition to the goods, chattels, and effects" thereby "assigned, or any of them, or otherwise howsoever, during the time that any money" might "be owing upon the security of" the said bill of sale.

On the 25th of April, 1881, the said J. Baggs, who still continued to be tenant of High House Farm to the defendant, was in arrear with his rent, and the defendant accordingly on that day distrained for the rent then due, and whilst he was in possession under such distress, and without any knowledge of the bill of sale which had been so given to the plaintiff, the defendant, on the said 25th of April, entered into an agreement in writing with the said J. Baggs by which he agreed to forego all claim of rent then due or which might become due to him from the said J. Baggs, and to withdraw the distress except as to two cows and a calf; and the said J. Baggs agreed to give the defendant possession on the 24th of June, 1881, of the house, buildings, land, and crops which he then held as tenant of the defendant.

The defendant accordingly gave up his claim for rent, and withdrew from the distress. Shortly afterwards, namely, on the 20th of May, 1881, the plaintiff entered and seized under his bill of sale the property of Baggs on the farm. He also claimed the growing crops, and in order to take possession of them he put locks on the gates of the fields in which the crops were growing. The defendant's solicitor thereupon, on the 23rd of May, 1881, gave the plaintiff a formal notice in writing of the said agreement

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between the defendant and Baggs for the possession of the farm, and that the defendant claimed to be entitled thereunder to the crops on the property, and that he considered the plaintiff's attempt to take possession of the land by putting locks on the gates was a trespass. The plaintiff on receipt of this notice took the locks off the gates, and on the 1st of June, 1881, the defendant was served with a formal notice of the bill of sale and of the assignment by it of the crops to the plaintiff; but previously, namely, on the 19th of May, the defendant had had a verbal notice of the plaintiff's claim to the crops. On the 24th of June, 1881, the defendant took possession of the farm according to the agreement between him and Baggs, and he afterwards cultivated the crops, and when they were brought to maturity he reaped and sold them. For such removal and sale of the crops the present action, which was one of trover, was brought. It was tried before Lopes, J., at the Hereford Spring Assizes of 1882, when the jury found a verdict for the plaintiff for 15*l.* 17*s.* 4*d.*, and the learned judge afterwards gave judgment for the plaintiff for that amount. (1)

The defendant appealed.

Bosanquet, Q.C., for the defendant. In the first place the bill of sale did not pass any property in the future crops, and even if it did give the plaintiff any equitable right as against Baggs to the crops which came into existence after the bill of sale was given, it gave the plaintiff no right to them as against the defendant.

[COTTON, L.J., referred to *Holroyd* v. *Marshall.* (2)]

There the machinery, though not in existence at the time of the grant, became specific when brought in and attached to the premises. Here it applies to future crops generally, not only such as may be on High House Farm, but on any other premises of the tenant, and is not limited to those on any particular place, and is therefore bad: *Belding* v. *Read* (3), which was acted on

(1) It was admitted by counsel for the plaintiff during the argument that the rent, if the tenancy had continued, would with the expenses of reaping and harvesting the crops exceed the value of the crops.

(2) 10 H. L. C. 191; 33 L. J. (Ch.) 193.

(3) 3 H. & C. 955; 34 L. J. (Ex.) 212.

and followed by Fry, J., in *In re Count D'Epineuil.* (1) The case of *Lazarus* v. *Andrade* (2), which was decided by Lopes, J., on the authority of *Holroyd* v. *Marshall* (3), is very different, for there the property became specific by being brought on the premises, and was not vague and general as in the present case. Next, the action of trover will not lie, and even if, since the Judicature Act, the plaintiff may maintain his action provided he has any equitable right to the crops, he has no such right as against the defendant, who is the landlord, and who had distrained for rent and had afterwards taken a surrender of the tenancy, and was therefore in the position of a purchaser for value without notice, so that as against him the plaintiff has no equity or right of action.

Jelf, Q.C., and *Rose,* for the plaintiff. The description of the future crops is sufficiently specific to entitle the plaintiff, as against Baggs, for a specific performance of the contract. It is at least sufficient as regards the crops to come into existence on the the High House Farm, and the words should be construed distributively.

Then as to the plaintiff's right of action against the defendant, if he has an equitable right that will do to support this action, and it is immaterial for that purpose in what form the action has been brought. The assignment of the future crops by Baggs to the plaintiff became complete as soon as they came into existence. "A man," says Jessel, M.R., in *Collyer* v. *Isaacs* (4) "can contract to assign property which is to come into existence in the future, and when it has come into existence, equity treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment." The property in the crops having thus passed to the plaintiff, it was not competent to Baggs by his surrender to the defendant to do anything which was in derogation of what he had so previously given to plaintiff. The defendant had notice of the plaintiff's claim before the surrender was completed, and he cannot be considered as a purchaser for value without notice, for he had had

(1) 20 Ch. D. 758.
(2) 5 C. P. D. 318.
(3) 10 H. L. C. 191; 33 L. J. (Ch.) 193.
(4) 19 Ch. D. 342, at p. 351.

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notice. In fact he comes in under Baggs, and is subject therefore to the liabilities of Baggs.

Bosanquet, Q.C., replied.

Cur. adv. vult.

April 28. BRETT, M.R. [After stating the facts, his Lordship proceeded as follows:—] If this action be treated as an action at common law it would be one of trover, and there would be several fatal objections to the plaintiff's maintaining it, but it has been said that the plaintiff is entitled to treat it as an equitable action, that he is entitled to insist in equity that if the crops had not been sold they should be handed over to him, and after they had been sold, he should be paid damages in respect of their having been sold. Now, the first objection taken by the defendant to this contention on the part of the plaintiff was, that the bill of sale given by Baggs was so vague and indistinct as to future crops, that a specific performance or anything in the nature of it would never have been granted in equity. The bill of sale, however, in my opinion, relates to two different sets of future crops, one of crops as should thereafter be upon this High House Farm, and the other of crops which might thereafter be anywhere. With regard to the last, I think it too indefinite, but this cannot affect the description of the future crops on this farm, which appears to me to be sufficiently distinct and definite to identify the property meant to pass, and which therefore in equity did pass, between the parties to this bill of sale. Consequently, I am of opinion that this objection cannot succeed.

The next point is this. It was said that the plaintiff has an equity against the defendant, and that before the defendant's title as between him and his tenant was completed, the defendant had notice of the plaintiff's claim and therefore the plaintiff's equity was to be preferred; in other words, it was said that there were two equities, and that the first equity, which was the plaintiff's, should prevail. This is not, in my opinion, a case in which there were two equities, for the defendant's title as between him and his tenant was not an equitable but a legal one.

The defendant was owner of the farm, and as landlord he distrained for rent, and then for a valuable consideration, that is,

for giving up the rent which was due, he agreed with his tenant to take a surrender of the farm on a particular day, namely, the 24th of June; and on that day the tenant accordingly surrendered the farm to the defendant and went out. The result of that was a surrender of the tenancy by operation of law, and the whole of the property became legally vested in the defendant without the existence of any tenancy. The defendant was then in possession as legal owner. It is true that a surrender cannot take effect at law if there be existing any legal interest in the property which had been previously created by the tenant; but in this case there was no such legal interest, and nothing, therefore, to affect the legal result of the surrender which had been agreed to between the defendant and his tenant. Then the defendant having thus become the legal owner in possession of this farm, the question is, whether nevertheless the plaintiff has an equity against him, that is to say, although in law there was a valid surrender of the tenancy, and although the defendant, as against the tenant and everybody but the plaintiff, was the owner in possession of the farm and crops, yet nevertheless, in equity, the plaintiff had a right to treat the surrender as no surrender so far as concerned these crops. If as between the plaintiff and defendant the surrender is to be treated as no surrender, then as between them the defendant must be considered in possession under the distress with a right to sell, and consequently the utmost that the plaintiff, even on that view, can be entitled to as against the defendant is the surplus, if any, on any such sale after paying the expenses of the distress and sale, and also the expenses of cultivating and gathering the crops, and after paying the rent, but according to the facts, as I understand them, there would be no such surplus, and therefore nothing for the plaintiff to receive. Under these circumstances I differ from the judgment of my Brother Lopes, and am of opinion, upon the view I have taken both of the law and equity, that judgment ought to be for the defendant.

COTTON, L.J. In this case Baggs, who was the defendant's tenant of a farm, gave a bill of sale to the plaintiff, and the question is as to the plaintiff's right under such bill of sale to certain

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crops which were not in existence at the time the bill of sale was given, but which came into existence when an agreement was made between the defendant and Baggs, by which Baggs surrendered his tenancy to the defendant. The action is in form an action of trover, but of course it cannot be maintained in that form, and it has been argued for the plaintiff that under the Judicature Act there is now a fusion of law and equity, and that the plaintiff must therefore be considered in the same position and having the same title he would have had in equity to these crops, notwithstanding that they were not in existence at the time, so that the bill of sale operated to pass an interest in such property to the plaintiff. I mention this to correct a mistake. It is true that every Court now administers and deals with the rights of parties having regard both to law and equity, but the legal position and the equitable position are still different and distinct, so that it is a mistake to say that because this deed is operative in equity, so as to give the plaintiff a claim to crops which were not in existence at the time the deed was made, it must be treated since the Judicature Act as if for that purpose it were effectual at law.

An objection to this bill of sale has been taken on behalf of the defendant with respect to the future crops, and it has been contended that it was not effectual as against Baggs, because, as appears from the judgment of the House of Lords in *Holroyd* v. *Marshall* (1), in order to be so effectual in equity the property which is not in existence at the time of the execution of the deed must be sufficiently specified, and that that was not done here because the bill of sale describes such future crops as those on this farm and elsewhere, and this it was said was too vague and general. In my opinion it is not, and I agree with the Master of the Rolls that this is really an assignment of the future crops on this farm, and also distributively of any other future crops which Baggs may be entitled to. I further am of opinion that crops whilst growing are part of the inheritance, and stand in a different position from that of mere chattels, and that that distinguishes this case from that of *Belding* v. *Read* (2). But,

(1) 10 H. L. C. 191; 33 L. J. (Ch.) 193.

(2) 3 H. & C. 955; 34 L. J. (Ex.) 212.

besides, the decision there seems to me to have turned upon the instrument purporting, as the Court read it, to assign in general terms all the personal property to which the assignor should be entitled at any time and anywhere. Indeed, that is how that case is dealt with by Cockburn, C.J., in *Leatham* v. *Amor* (1). However, whether or not that be the true explanation of that case, the objection that the future crops in the present case are not sufficiently specific cannot in my opinion prevail; and as against Baggs the plaintiff would be entitled in equity to these crops when they came into existence. Then is the defendant in a better position than Baggs. It was contended on his behalf that he ought to be considered as a purchaser for value without notice, and that, therefore, although the title of an assignee under a bill of sale analogous to that in the present case was enforced against a judgment creditor in *Holroyd* v. *Marshall* (2), the title of the plaintiff ought not to be enforced against this defendant. That contention must, in my opinion, fail, because the defendant certainly had full notice of the plaintiff's claim before he took possession of the farm under the surrender, and there was nothing done by the plaintiff which can be said to have induced the defendant to have acted to his prejudice by withdrawing the distress, nor had the plaintiff in any way laid by and let him into a trap as it were. The defendant, therefore, by getting the estate surrendered to him and so taking possession with notice of the plaintiff's claim, must be considered as between him and the plaintiff as coming in under Baggs. Then on what principle is the plaintiff entitled to succeed? It must I think be on the principle stated in Coke on Littleton, 338 b, as to a surrender, that "having regard to strangers who were not parties or privies thereunto, lest by a voluntary surrender they may receive prejudice touching any right or interest they had before the surrender, the estate surrendered hath in consideration of law a continuance." The plaintiff here insists on an equity which he has against Baggs, and the defendant relies on an arrangement by which, as between Baggs and the defendant, the tenancy was absolutely put an end to. The plaintiff must therefore avail himself of the principle so enunciated by Lord Coke,

(1) 47 L. J. (Q.B.) 581.

(2) 10 H. L. C. 191; 33 L. J. (Ch.) 193.

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and insist that as against him Baggs' tenancy must be considered as continuing. If then the plaintiff so insists on the estate of Baggs continuing so as to enable him to take the crops, he must take it with the burden on the land; and with the liability for the rent to which Baggs would have been liable if there had been no surrender. But I go further than that. If the plaintiff had come in and reaped the crops, he would have had to pay the expense of turning them into the marketable commodity of which he is now seeking to have the value. That being so, it appears to me to be analogous to the case of miners working adjoining mines where one takes the coal of the other. If he does so, knowing that he has no right to it and with the intention of appropriating to himself the coal of the other, he gets no allowance whatever for the expense of getting it, but if he does it with the honest belief that it is his own coal, he is entitled to the expense of severing it and bringing it up. So here I think the defendant is entitled not only to the rent but also to the expense of reaping, and otherwise harvesting and preparing the crops for the market. The result in my opinion is, that though theoretically the plaintiff is entitled to relief, yet all he is entitled to is the value of the crops subject to the rent due to the landlord, and also to the expenses of harvesting and making the crops fit for market, and these I understand will destroy the plaintiff's claim and leave him in fact nothing.

BOWEN, L.J. The first fact essential to our decision is that Baggs, on the 22nd of September, 1880, made a bill of sale by which he purported to assign to the plaintiff, amongst other things, all growing crops which at any time should be upon his premises, High House Farm, or upon any other premises of his during the time any money should be owing upon that security. The second essential fact is, I think, that in February, 1881, the defendant, who was Baggs's landlord, distrained for rent, when an agreement was made between him and Baggs that the former should go out, and that at the end of the current quarter there should be a surrender of the farm to the defendant. On the faith of that bargain the defendant accordingly went out, and though I confess I do not think it material for the purpose of

this case, yet as a fact the defendant at that time, when the agreement was made, had no notice of the plaintiff's right under the bill of sale, but between that time and the 24th of June, when the surrender was completed, he had acquired such notice.

On the 24th of June the defendant entered and took possession of the farm and of the growing crops, and these he afterwards reaped and sold. This action is then brought against him, and it is in form one for trover, but it matters not what its form is, for the plaintiff is entitled to maintain his action if he has a right at all to damages.

Now the first point taken by the defendant with regard to the bill of sale is an extremely technical one—it is that the description of the crops is too vague, and that neither in law nor equity does the bill of sale confer on the plaintiff a right to growing crops anywhere, because the words are that he is to have the crops on the farm which Baggs then had, or upon any other farm which should come into his possession. Now at law the bill of sale would pass no property in crops not in existence, but at most it would give a right to enter and take them should they come into existence, but in equity it would confer a right on the grantee to the property when it should come on the farm. Now is a bill of sale too vague because it says that the grantee shall have all the future property of the grantor on Blackacre and on all other premises which may happen to be his hereafter? I think it amply sufficient to cover the crops on Blackacre, at all events, but even if it were to amount merely to a contract to allow the bill of sale holder to take possession of all future crops as should come into the possession of the farmer, I confess I am not at present prepared to say that would be too vague. I should think if the matter rested on one's natural instinct that as soon as the property by its coming into existence becomes sufficiently ascertained to fulfil the description of the contract, it ought to be bound by the terms of the contract. It would not fall within the case of *Holroyd* v. *Marshall* (1), where it is said that a contract for the sale of goods "as for example, 500 chests of tea, was not a contract which could be specifically performed," because it does

(1) 10 H. L. C. 191; 33 L. J. (Ch.) 193.

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not relate to any chests of tea in particular, nor do I think it would be barred by the following language of Lord Westbury in that case: "But if a vendor or mortgagor agrees to sell or mortgage property real or personal of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would in equity transfer the beneficial interest to the mortgagor or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree specific performance."

It is, however, not necessary to consider that obscure point, because in the present case the contract professes to pass to the plaintiff all the growing crops which shall thereafter be upon High House Farm, and the introduction of the subsequent words "or any other premises," does not destroy the effect of all that has gone before, any more than a deed which should mortgage all a man's property in Sussex and in the moon should be bad as a mortgage of the property he had in Sussex because he had no property in the moon. Therefore the first point, which is a technical one, is, I think, bad.

As to the other point. The landlord came into possession by virtue of the surrender, and it was contended that the tenant could not surrender his farm without derogation from his grant to the bill of sale holder. There seems to me to be a clear answer to that contention. The landlord had an absolute right to distrain, and to distrain upon these crops, and nothing which could take place between the tenant and the bill of sale holder could destroy that right. Supposing even that the defendant had known of the bill of sale at the time he went into possession under the distress and at the time he made the bargain with the tenant for the surrender, what effect would that have had? It would have been notice to him that he had no right to take from the tenant any thing which was in derogation of the tenant's grant to the plaintiff by the bill of sale, but the defendant, as landlord, would have had a right to take everything else, and no notice could

affect his right to go into possession and distrain. I think, also, that it could not affect his right to hold possession and to take a surrender of the tenancy, provided the distress eat up, so to speak, the plaintiff's claim under the bill of sale, so that there was nothing of it left which could be defeated by the surrender. A surrender at law has been well known ever since the time of Lord Coke, and although effectual as between the landlord and his tenant, it is not effectual to destroy the rights of strangers in respect of any interest acquired before such surrender. So has said Lord Coke, and so has said the Court of Common Pleas in *London Loan and Discount Co.* v. *Drake* (1).

Treating then the surrender as having in the eyes of the law a continuance as regards any interest which had before arisen, and assuming that the plaintiff had a right to the crops as against Baggs, he had it subject to its seizure for distress, and it seems to me that the defendant could not be turned out of possession of the crops he had seized simply because he had taken something more. His taking the surrender of the tenancy in addition to the crops could not possibly injure the plaintiff or affect any interest he had acquired, because there was the right to distrain, which covered the whole ground.

With respect to the argument that as the defendant withdrew the distress and went out in pursuance of the contract for surrender, he became a bonâ fide purchaser for value and without notice, and that having subsequently acquired legal possession under the contract he had a right therefore to hold it, the answer is that before the surrender was completed the defendant had notice, and in equity if a purchaser has notice before completion of the contract that will do, and he has no right to ask the vendor to commit a fraud upon a person who has a previous right. But assuming, as I do, that that is the rule in equity, that does not apply here, for the right of the plaintiff, even if he gave the defendant all the notice in the world, was not a right to prevent the defendant's going into possession and distraining; and all the plaintiff's right being swallowed up by the distress, there was nothing to prevent the defendant remaining in possession, whether he so remained as surrenderee or as a landlord.

(1) 6 C. B. (N.S.) 798; 28 L. J. (C.P.) 297.

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This appeal must therefore be allowed, and the judgment which has been entered for the plaintiff must be reversed.

Judgment reversed.

Solicitors for plaintiff: *Smiles & Co.*

Solicitor for defendant: *J. Fortune, for W. J. Humfrys, Hereford.*

W. P.

April 20.

[IN THE COURT OF APPEAL.]

POUNTNEY *v.* CLAYTON.

Mines—Right of Support to Surface Land—Railways Clauses Consolidation Act, 1845 (8 *Vict. c.* 20), *ss.* 77, 78, 79.

In 1865 the owner of land demised the minerals under it to the defendant for a term of years, and in 1867 conveyed the surface of the land to a railway company under the compulsory powers of the Lands Clauses Consolidation Act, 1845, which was incorporated with the company's special Act, and some years afterwards the company sold part of such land as superfluous land to persons who ultimately sold it to the plaintiff. The railway company never purchased the minerals or made compensation to the defendant as such lessee under the powers conferred on them by the Railways Clauses Consolidation Act, 1845, and the defendant worked the mines in the usual manner of working in the district, and by so doing caused a subsidence which damaged some houses erected by the plaintiff upon the land.

In an action against the defendant for working the mines without leaving a sufficient support for the plaintiff's land:—

Held, that the defendant had not interfered with any right of the plaintiff, who could have no greater right than the railway company from whom he derived his title, and that upon the construction of ss. 77, 78, and 79 of the Railways Clauses Consolidation Act, 1845, if a railway company has exercised the option it has under that Act of purchasing land under their compulsory powers without the mines and minerals thereunder, the owner, lessee, or occupier of such mines and minerals has a right to work the same without regard to whether such working will let down the surface, provided the working is according to the usual way in the district.

ACTION against a mine owner for working his mines under and adjacent to land of the plaintiff without leaving sufficient support for the land, whereby it and houses thereon belonging to the plaintiff sank, and he sustained damage. On the trial before Watkin Williams, J., and a special jury at the Shrewsbury summer assizes, 1882, it appeared that on the 4th of April, 1865,

Penson, the owner of a freehold farm near Wrexham, granted to the defendant a lease of all the minerals under the farm for twenty-one years. The lease provided that the lessor should not be held liable for any claim in respect of the Wrexham, Mold and Connah Quay Railway, which was then projected, and was to pass over a part of the farm. The lease contained only the usual covenants, and no reference to any right of support for the purposes of their undertaking.

The railway company required and took part of the land under the compulsory powers of the Lands Clauses Act, 1845 (8 Vict. c. 18), incorporated with their special Act, and the land in question was in 1867 conveyed to the railway company by the lessor. The company, after advertising the land for sale by auction, sold it as superfluous land, and on the 27th of October, 1876, conveyed a portion of it to one Price, and another portion to one Jones. In November, 1876, Jones conveyed his portion to Price, who conveyed the whole to the plaintiff. Houses were built on it by the plaintiff. Without having given any notice under the Railways Clauses Act, 1845, s. 78 (1) of his intention to do so, the defendant worked his coal underneath the land, and caused it to subside, and thereby damaged the houses.

(1) The following are the material clauses of the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20).

"And with respect to mines lying under or near the railway be it enacted as follows:—

"Sect. 77. The company shall not be entitled to any mines of coal, ironstone, slate, or other minerals, under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away or used in the construction of the works, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby.

"Sect. 78. If the owner, lessee, or occupier of any mines or minerals lying under the railway, or any of the works connected therewith, or within the prescribed distance, or, where no distance shall be prescribed, forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof to

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The jury found that the subsidence and damage was caused by the undermining, and the learned judge directed a verdict for the plaintiff, and a verdict and judgment were entered for him. A rule nisi for a new trial having been granted on the ground that the learned judge misdirected the jury in telling them that a purchaser of land from a railway company who have compulsorily purchased under the Railways Clauses Act, 1845, has the same right of support as an ordinary purchaser of surface—

Matthews, Q.C., and *Poyser*, shewed cause. The plaintiff's right of support at common law is undoubted; but the defendant contends that inasmuch as the land was bought of a railway company by the predecessor of the plaintiff, his common law right is destroyed. Such, however, is not the effect of the Lands and Railways Clauses Acts. The plaintiff does not say that he bought the minerals, or that the railway company were entitled to them. The company are not entitled to minerals "unless the same shall have been expressly purchased" by them: 8 Vict. c. 20, s. 77. Under s. 78, the mine owner may give notice of his intention to work the minerals, and the company may compensate him for not working them. But there is nothing in those

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such owner, lessee, or occupier thereof, then he shall not work or get the same; and if the company, and such owner, lessee, or occupier, do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation.

"Sect. 79. If before the expiration of such thirty days the company do not state their willingness to treat with such owner, lessee, or occupier for the payment of such compensation, it shall be lawful for him to work the said mines or any part thereof for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate; and if any damage or obstruction be occasioned to the railway or works by improper working of such mines, the same, shall be forthwith repaired or removed, as the case may require, and such damage made good by the owner, lessee, or occupier of such mines or minerals, and at his own expense; and if such repair or removal be not forthwith done, or, if the company shall so think fit, without waiting for the same to be done by such owner, lessee, or occupier, it shall be lawful for the company to execute the same, and recover from such owner, lessee, or occupier the expense occasioned thereby, by action in any of the Superior Courts."

sections to deprive the landowner of his right of support if no notice be given. In all the decided cases notice has been given. Therefore, as in this case no notice has been given, the decisions are not in point. That which appears most adverse is the *Great Western Ry. Co.* v. *Bennett* (1). But that case turned entirely on the notice sent, and the House of Lords did not decide that the railway company had no right of support, but merely that such right was regulated and modified by the statute. Lord Westbury said: "Although the mines *in solido* are, without any exception, reserved to the mine owner, he is not at liberty to win them, or to proceed to get them without notice to the railway company." But the defendant has done so here. The plaintiff is, as the railway company, entitled to notice.

[DENMAN, J. The notice is to be to the railway company, not to their assigns.]

Either the clauses do not apply to the plaintiff, or if they do, they only modify his right to support. It is important not only to the parties, but for the safety of the public, that thirty days notice of intention to work the mines should be given: see *Dixon* v. *Caledonian and Glasgow and South Western Ry. Cos.* (2); *Errington* v. *Metropolitan District Ry. Co.* (3). The mine clauses are for the benefit of the railway company. The right of pre-emption of the supporting minerals goes with the land. The plaintiff has a right not to have his surface undermined without notice: see *Smith* v. *Great Western Ry. Co.* (4). It is said for the defendant, that if the railway company sell under 8 Vict. c. 18, s. 127, the purchaser from the company cannot get more than the company. Then if the statutes apply to him as well as to the company, he is entitled to the benefit of the provision for notice.

Jelf, Q.C., and *F. A. Bosanquet*, in support of the rule. The effect of the summing-up was that the learned judge said that the company had parallel rights under and apart from the statutes. But that was the argument overruled in *Great Western Ry. Co.* v. *Bennett* (5), which is practically conclusive. The plaintiff seeks to deprive the defendant of minerals for which he has not been

(1) Law Rep. 2 H. L. 27.
(2) 5 App. Cas. 820.
(3) 19 Ch. D. 559.
(4) 3 App. Cas. 165.
(5) Law Rep. 2 H. L. 27.

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paid. The purchase by the railway company was a purchase of land without the right of support (except such as might be acquired under the Act). They paid for no right of support, they bought no minerals, and it may be assumed that the plaintiff paid less for the land in consequence. The object of the provision for notice is to protect the railway. But the provision is wholly inapplicable to the case of a purchaser from the railway company. The right of support is not a right inherent in the surface. It depends on the circumstances of the division of the ownership of the surface, and the mines beneath. The rights are entirely regulated by ss. 77 and 78: see *London and North Western Ry. Co.* v. *Ackroyd.* (1)

By s. 77, the minerals under all the lands purchased by the railway company are excepted. But the notice prescribed in s. 78 is only applicable to minerals "lying under the railway or any of the works connected therewith, or within forty yards therefrom."

Cur. adv. vult.

1882. Dec. 21. DENMAN, J. [after stating the facts above set forth.] It was contended for the plaintiff that the learned judge's ruling was right, and that the purchase from Price of the surface in 1876 gave the plaintiff all the rights of an ordinary purchaser of land to support from the subjacent and adjacent soil. The defendant, on the other hand, insisted that—inasmuch as the company when they purchased, purchased no right to the minerals nor any right to support, and no absolute right to prevent the lessee of the minerals from working, but only a right to have thirty days' notice of any working under the railway or works or within forty yards therefrom, with a right to prevent such working, and to compensate the mine owner in respect of the mines not allowed to be worked,—the purchaser from the railway company could not be in a better position than the railway company itself, and therefore would have the land without the ordinary right to support of an owner of land with mines subjacent. No case has yet been decided as to the rights of a purchaser of superfluous land from a railway company

(1) 31 L. J. (Ch.) 588.

with mines underneath, and there is considerable difficulty in dealing with the case; but after full consideration of the arguments on both sides, and the cases cited, I have come to the conclusion that the ruling of the learned judge, as applied to the facts of the present case, was right. In 1865 the land, both surface and mines beneath, belonged to Penson. On the 4th of April, 1865, he leased the mines and minerals to the defendant Clayton for twenty-one years, a period not yet expired. Penson then had no right to convey the mines and minerals to the company or any one else, but he had a right to convey the surface with ordinary right of support, and such right would be presumed to pass with the land unless a clear intention to the contrary were to appear from the conveyance. If he had sold the land in 1867 to any one but a railway company, that person would have been entitled as against Clayton to the ordinary support of the land notwithstanding the lease of the mines and minerals to Clayton, and might have brought an action against him for letting down the surface by working the mines: *Davis* v. *Treharne*. (1) Penson, then, having as against the defendant Clayton a right to the ordinary support of the surface, in 1867 conveyed his interest in the land to the railway company under the compulsory clauses of the Railways Clauses Act. What, then, was the right of the railway company? This depends upon ss. 77–79 of the Railways Clauses Act, and the cases which have been decided upon those sections.

I think the result of the cases, so far as they bear upon the present, is as follows:—When the railway company purchased Penson's interest they clearly bought no right to the minerals. Those were in the defendant for twenty-one years from 1865, so that, even independently of s. 77 of the Railways Clauses Act, the right to the minerals remained unaffected by that purchase. But they did by that purchase, and by the effect of s. 78 acquire a right not to have the minerals "lying under the railway or . . . works or within . . . forty yards therefrom," worked until a thirty days' notice should have been given by Clayton, and a right to prevent the working of any such mines and minerals and to make compensation to Clayton as occupier thereof according

(1) 6 App. Cas. 460.

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to the provisions of the Act. They had also (as was held in *Errington* v. *Metropolitan District Ry. Co.* (1)) a right, even after the thirty days, to purchase the mines compulsorily if required for the purposes of their railway.

This section, it will be observed, applies only in its terms to mines and minerals the working of which appears "likely to damage the works of the railway," and only to mines or minerals "lying under the railway, or . . . works . . . or within . . . forty yards therefrom." As to all other mines and minerals lying under or adjacent to land purchased by the railway, there is nothing in the words of the Act on the one hand to prevent the mine owner from working them, nor, on the other hand, exempting the mine owner from being liable to the ordinary liability for letting down the surface, though of course he would not be liable to the additional burthen of supporting the surface as against any additional weight imposed upon the land by the company. By s. 79 if the company do not, before the expiration of thirty days' notice, state their willingness to treat for the payment of such compensation, the mine owner may "work the said mines . . . in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines," and provisions are made for damage or obstruction to the railway or works by improper working. Reading all these sections together, and also s. 81, which relates to the compensation to be made to mine owners "by the reason of the same being worked in such manner and under such restrictions as not to prejudice or injure *the railway*," and for any minerals not purchased by the company which cannot be obtained "by reason of making and maintaining the railway," I should have felt a great difficulty in holding, in the absence of authority, that they apply to mines under land purchased by the railway company and afterwards sold by them to third persons as superfluous land, at all events unless such land is land upon which the railway or works have been constructed, or land within forty yards therefrom. It may be that in respect of minerals under or within forty yards of such lands, inasmuch as they are expressly mentioned in s. 78, the company have all the rights which they possessed before parting with the land to

(1) 19 Ch. D. 559.

prevent the mines being worked even after sale of a portion as superfluous; but at all events I can see nothing in those clauses which would enable the mine owner, as against a *purchaser* from the railway, to let down the surface of land sold as superfluous, in any case in which he could not have done so *before* the railway purchased the land—nothing to exclude the primâ facie common law right of the owner of the surface to the ordinary support to which land is entitled as against persons working mines below it. The case of *Great Western Ry. Co.* v. *Bennett* (1) does not, in my opinion, conflict with this view, for that was a case in which the question arose between the railway company, being at the time owners of the surface and having had notice under s. 78 that the mine owner desired to work the mines, and the mine owner; not between a purchaser from the railway company, to whom s. 78 and the machinery provided therein could not apply, and a mine owner.

It was held in that case that the railway company did not, after notice of working by the mine owner, and no offer to treat for compensation by the company, have the ordinary right of action for letting down the surface. But in the present case, when the land was parted with by the railway company as superfluous, it seems clear that it could no longer either be necessary for the mine owner to give notice to *them* of their intention to work, or competent to him to rely on a clause which had ceased to be applicable as soon as the land came into the hands of a purchaser of "superfluous" land. It appears to me that the very fact of its being superfluous land causes the application of ss. 77–79 (assuming it to have existed in the case of the lands in question) to cease. Then what is the liability of the lessee of the mines? I answer, exactly the same as it was when he became lessee, not to let down the surface by mining operations, unassisted by any loading of the surface by buildings, railways, or other superimposed weight. But this is what he has here done. But it is argued that the plaintiff, who bought in 1876, must have obtained the lands cheaper when he bought them from the railway company by reason of their liability to compensate the defendant for his right to work the mines, and by reason of the

(1) Law Rep. 2 H. L. 27.

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inability of the company to rely upon the ordinary right of support. I do not think that this is necessarily, or even probably, so in fact; I certainly think it would not be so as regards any lands not within forty feet of the railway, and, even in the case of lands under or within forty feet of the railway, I cannot see why the mine owner should now be entitled to let them down as against a purchaser from the railway company, even if the railway company might stop the working of the mines, or of that portion of them which is under the railway works or within forty yards therefrom, paying compensation to the mine owner for loss occasioned to him thereby. The two rights of the plaintiff and the railway company may well co-exist. The former is only to have the ordinary support of the surface. The latter may still be to prevent the working of the mines under or within forty yards of the railway, paying compensation. Or it may be, and I think this is the true result, that the sale of the land as superfluous may have divested the railway company of all its rights under clauses 77–79, in which case I see no reason why, in selling to the purchasers from whom the plaintiff bought, the company may not have been fairly compensated by them, and they by the plaintiff afterwards, upon the basis of his having acquired the land with all the usual incidents belonging to land, with minerals subjacent. They could not in the nature of things transfer to private persons all their statutory rights under ss. 77–79; but I can see no reason why, upon the ceasing of those rights, they might not and did not convey the land to the plaintiff's vendors with such rights as against the lessee of subjacent mines as the owner of the land possessed at the time at which he originally conveyed to the railway company. In *Dixon* v. *Caledonian and Glasgow and South Western Railway Companies* (1) Lord Selborne treated the clause in the Scotch Act corresponding to s. 78 as having the effect of introducing a limitation of time "for the purpose simply of determining how long the mine owner's right of working shall be kept in abeyance." This is, I think, its true effect, and in a similar manner I think that as long as the railway company kept the land the effect of these sections was to keep in abeyance or to suspend, not to destroy, the common law

(1) 5 App. Cas. 820, at p. 829.

right of support which would, but for those sections, have belonged to the company, and only to suspend them as long as the company remain owners of the land, and that when they parted with the land as land not required for their purposes, that is, as superfluous land, they had a right eo instanti to transfer the land to a purchaser, with the right to support which was incident to it at the time when they originally purchased it; and that they did transfer that right as against the defendant, who had never in any way got rid of liability so to work his mines, as not to let down the surface except during the period of the railway company's ownership of the land. For these reasons I am of opinion, though with great diffidence, owing to the opinion to the contrary entertained by my learned Brother, that the ruling of the learned judge at the trial was right as applied to the facts of the case, and I therefore think that the order nisi should be discharged.

MANISTY, J. I regret that I differ from my brother Denman. I will state my reasons for doing so, and another Court must ultimately decide the case. It depends on the true answer to this question, viz., what were the relative rights of the railway company and the mine owner when the railway company took compulsorily the surface only of the land from the owner, he being owner of both land and minerals? It is settled and clear law that a person who owns the surface of land has a right to have it supported by the minerals below. But that is only at common law, or as of common right. In each case, if there are documents, be they deeds or statutes, the Court is to look at them in order to see whether the plaintiff has that common right or not. This is a case of a compulsory purchase of land, and it must be land taken for the purposes of the railway, as a railway company is only authorized to purchase compulsorily lands for the purposes of "the railway," which, by the interpretation clause of the Railways Clauses Act, includes all works by the special Act authorized to be constructed, and, in the case of the landowner being also the mineral owner, then by s. 77 of the Railways Clauses Act, unless the mines are expressly purchased, "all such mines . . . . shall be deemed to be excepted out of the

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conveyance of such lands." If it stood there, then the authorities are conclusive that there was a right of support. *Hext* v. *Gill* (1) has been followed in other cases, and I think contains the whole law on this matter, that in the ordinary case of a conveyance of land "excepting the mines and minerals," the owner of the minerals can only work his mines leaving sufficient support for the surface. The landowner who, in such case, parts with the surface knowing, or when he ought to know, that unless he expressly contracts to the contrary, he will have to leave support for the surface, fixes his price accordingly, and, in the purchase-money, gets compensation for leaving sufficient support. But this case depends not only on the 77th section, but on ss. 78 and 79 of the Act, and although, apart from authority, it might well be contended that these sections were only intended to give additional right of support for the railway, yet, whatever we may think of such an argument, it is now too late to review the decision of the House of Lords in *Great Western Ry. Co.* v. *Bennett* (2), in which it was held that the common law right does not apply, and that s. 77 must be construed with ss. 78 and 79, and so construing them, the railway company buying the surface only, do not buy and do not pay for any right of support. If, then, where the railway company buying the land for the purposes of the railway (I lay great stress on those words)—and it must be assumed they purchase for those purposes, for they can only purchase for them —purchase a piece of land part of which is and part is not for those purposes, and do not acquire or pay for a right of support for the surface, it would, I think, be a strange result that, not having bought and paid for it, and not getting it without, they should give a purchaser from them a better title than themselves.

So I first consider what is it they buy and acquire? That brings me to *Great Western Ry. Co.* v. *Bennett.* (2) My brother Denman thinks it distinguishable as it had reference to the railway proper, viz., the land on which the railway is made and within forty yards. But, bearing in mind that the whole of the land is bought and held on the same principle, how can it make a difference as to the right which the railway acquired whether

(1) Law Rep. 7 Ch. 699. (2) Law Rep. 2 H. L. 27.

they put a railway on it or not? They buy all on one principle. In that case the land had been bought for the purposes of the railway; in due course the owner of the minerals gave notice under s. 78 that he intended to work the mines and minerals under the railway, and the company elected to purchase the minerals under the railway, i.e., under the railway and to within forty yards, and the question was on what principle was the compensation to be assessed? Was it to be assessed on the principle that the company by buying surface land acquired the ordinary right to support or not? And it made considerable difference, for if they had acquired the land with the ordinary right of support, the plaintiff was only entitled to 1085*l.*, if not, then to 8649*l.* for the mines and minerals. So the question was what had the railway company acquired, purchasing under these sections taken together? It was found as a fact in the award of the arbitrator, that if the mineral owner was bound to leave support for the surface, then he was entitled to a small sum, and it was found as a fact that the same amount of support would have been necessary for the support of the surface land if the railway had not existed. It was argued for the company that in fixing the price of the land the value of the minerals necessary to support the surface had, no doubt, been taken into account, but that argument did not prevail. Mr. Mellish arguing said that the practical result would be to give the railway, by mere purchase of the surface, a right to valuable minerals. The Lord Chancellor said, "The question depends entirely upon the clauses contained in the Railways Clauses Consolidation Act, 1845, under the heading 'with respect to mines lying under or near the railway,' beginning with s. 77." (1) Lord Cranworth still more decisively said, "It was obviously the intention of the Legislature, in making these provisions, to create a new code as to the relation between mine owners and railway companies, where lands were compulsorily taken for the purpose of making a railway. . . . The land was to be dealt with just as if there were no mines to be considered; nothing but the surface. . . . It is plain to me, upon the construction of that clause of the statute, that that was the intention of the Legislature; and that intention

(1) Law Rep. 2 H. L. pp. 37, 38.

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is fully carried into effect by giving to the mine owner, in this case the respondent, Mr. Bennett, that which the Court below has given to him, namely, the full right in all the mines which he worked, just as if he had not sold the surface." (1) Lord Westbury said, "There is no room for the ordinary implication which applies to a common grant, namely, that it extends by implication to all that, though not named, which is necessary for the support or enjoyment of the thing granted." (2) There are other passages to the same effect.

Is that not a decision that when a railway company acquires land for the purposes of the railway they acquire no right to support? They buy none, they pay for none, and in that case the mineowner got the 8649*l.* on the ground that he was not bound to leave any minerals as support. But then it is said that the land in question was superfluous land, and my brother Denman takes that view, and holds that the purchaser acquired a right of support. I cannot accede to that view. If the railway had no right to support neither has the purchaser; he can take no more than they gave him.

Rule discharged.

J. R.

The defendant appealed.

April 20. *Jelf, Q.C.*, and *Bosanquet, Q.C.*, for the defendant. *H. Matthews, Q.C.*, and *Poyser*, for the plaintiff.

BRETT, M.R. In this case the plaintiff, the owner of certain land, brought his action against the defendant, the owner of mines under such land, for that the defendant had so worked his mines as to let down the surface of the plaintiff's land, and thereby injure buildings of his which were upon it. The plaintiff's title was proved to have arisen thus. The land and mines originally belonged to one Penson, who leased the minerals to the defendant, and I will assume that according to the terms of that lease, as between the defendant and Penson, the defendant was bound to so work the mines as not to let down the surface. The meaning of that lease, I agree, is that all the minerals are, as it

(1) Law Rep. 2 H. L. pp. 40, 41. (2) Law Rep. 2 H. L. p. 41.

were, sold by the lessor to the lessee, if there be time to get them, but that they must be so worked that the surface should not be let down. The lessee must, therefore, leave enough coal to support the surface. The next step was that the railway company desired to purchase the land under the compulsory powers of the Lands Clauses Consolidation Act, 1845, and their own special Act. If the matter had remained under the Lands Clauses Consolidation Act, 1845, the railway company would have been bound if they bought the land to have given notice to the owner and also to the defendant the lessee, and to have compensated both. But by the Railways Clauses Consolidation Act, 1845, special powers are given to railway companies, by which, although if any other persons were to buy under the compulsory powers of the Lands Clauses Consolidation Act, 1845, they would be obliged to buy all, both the land and the mines under it, yet railway companies may reserve to themselves the option, and buy if they please the land, but not the mines. That is a power of election given to railway companies by which they may, if they please, elect to purchase the mines as well as the rest of the land, or only that which is popularly called the surface land, but which really means a right to all the land except the mines. Therefore, even where the mines are to be deemed excepted out of the conveyance to the railway company, any one who by digging the land and not by the operation of mining, were to let down the surface on which was the railway, would be a trespasser, as he would be digging on the land of the railway company.

What we have to consider here is the position and right of a railway company, who have exercised this option at the time of their purchase under these powers by electing to buy all the land except the mines. That depends on the true construction of ss. 77, 78, and 79 of the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), when read together. It seems to me that the right of the railway company and the right of the mineral owner are two converse rights, which taken together make up the whole right to the land. Now, one finds on reading s. 77, that the company is not to be entitled to any mines or minerals under any land purchased by them except only such parts as shall necessarily be dug out or used in the construction of the

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works "unless the same shall have been expressly purchased." Therefore unless the mines have been expressly purchased the company has no title to any part of them, for s. 77 concludes by saying "and all such mines excepting as aforesaid," that is, except only such parts as were necessarily dug out or used in the construction of the works, "shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby." Still, if that section had stood alone a question might have been raised whether, notwithstanding those concluding words of that section, a right would not nevertheless have been reserved to the railway company by implication to have what is called natural support or the support necessary to maintain their railway. If the owner of the land including the mines had sold to the railway company all the land except the mines, and such mines had been excepted out of the conveyance, it may be that as he was selling the land to the company for the purpose of their constructing a railway upon it there would not, unnaturally, be an implied obligation on him not to work the mines so as to let down the railway. That would be so implied, because he had granted the land to the railway company, but that is not this case, which is where the railway company against the will of the landowner have taken all the land except the minerals, having exercised their option as to whether they should buy them or not, and having made up their minds that they did not want the minerals for the purposes of their railway. If that 77th section stood alone, I might be inclined to agree with Lord Westbury, in *Great Western Ry. Co* v. *Bennett* (1), that there would be no implied right to support, but it is not necessary to decide that, because that section does not stand alone but is followed by other sections.

Now, there is to my mind a direct decision of the House of Lords in that case of the *Great Western Ry. Co.* v. *Bennett* (1), as to the true construction of the statute. The question there did not arise under the same circumstances as it does in the present case; but in looking to that case for a guidance, one is bound to see whether it fairly raised the question as to the construction of the statute, and if it did, what was the construction which the

(1) Law Rep. 2 H. L. 27.

House of Lords put upon it, and then apply that construction to the present case. Now, it is impossible, I think, to say that the question as to the true construction of the statute for the purpose of determining the rights of the owner of the land including the mines, and of the railway company at the time when the railway company purchased the land, was not brought before the House of Lords so as to make it reasonably necessary that they should determine it in order to decide that case. It appears to me that the House of Lords did decide what was the true construction of these three sections, the 77th, 78th, and 79th, when read together with regard to the rights of the railway company and of the owner of the land and minerals, and that every lord who took part in the decision of that case came to the same conclusion, namely, that the legislature—knowing what is called the natural right of the owner of the land to support, and knowing also what would be the implication made by law in the case of a grant of all but the minerals by the owner of the land and minerals to a railway company—meant by this statute to alter the ordinary law, and inasmuch as railway companies had obtained by it a right to elect whether they would buy both the land and minerals, or the land without the minerals, the House came to the conclusion that the construction to be put upon the statute was that where the railway company elected to buy the land without the minerals, the implication the law would otherwise have made was gone, and the minerals might be worked as against the railway company without regard to whether by so working the railway would be injured or not, provided that in the so getting out the minerals the mine was worked in the ordinary and usual way. That is so far a boon partly to the railway company, and partly to the owner of the minerals. As to the railway company, it postpones the necessity of buying the minerals, and so the railway company may keep the money required for such purchase, for it may be that the railway company may never want the minerals, or the owner of them may not want to work them for a hundred years; but then it would be unjust to give the railway company that power and not to give some compensation to the mine owner who has had the land taken from him without the mines. Therefore, the House of Lords came to the conclusion that the legislature

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had guarded the mine owner by declaring, that if the railway company took the land without the mines, the mine owner might work out all the minerals. But that would be too much against the railway company, inasmuch as then they might be liable to have their railway let down, and, therefore, as a protection to the railway company, it is provided by the 78th section that whosoever is the owner of the mines or minerals under the railway, or entitled to work them, shall not work them at all until he has given the railway company thirty days notice in writing of his intention to do so, whether he has entered into any contract with the railway company or not. There again the railway company have an option, for they may, if they please, send their surveyor into the mine to inspect it, and advise them as to whether it would be for their interest to prevent the mine owner from working the mine, and if they think it advisable, they are empowered by the statute, against the will of the mine owner, to purchase all or any part of the minerals, not only within the thirty days of which they have had notice, but at any time before the working of the mine has commenced. Thereupon the House of Lords said, that looking at these powers which are given, first to the railway company, secondly to the mine owner, and lastly back again to the railway company, they came to the conclusion that, if the only thing the railway company do upon the first purchase is to exercise their option by taking the land leaving the minerals, then as against such company, the minerals may be worked and got out without any regard to the railway being thereby let down or not. That that is so appears from the judgment of every one of the Lords. The Lord Chancellor says: (1) "This section" (s. 78) "appears to me to leave the mine owner to work his mine exactly as he would if the surface belonged to him." It follows, therefore, that he may work it so as to let down the surface. Then Lord Cranworth says: (2) "It was obviously the intention of the legislature in making these provisions to create a new code as to the relation between mine owners and railway companies where lands were compulsorily taken for the purpose of making a railway. The object of this statute evidently was to get rid of all the ordinary law on the subject and compel the

(1) Law Rep. 2 H. L. p. 38.

(2) Law Rep. 2 H. L. p. 40.

owner to sell the surface, and if any mines were so near the surface that they must be taken for the purpose of the railway, to compel him to sell them, but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered, nothing but the surface. That being so, justice obviously requires that when the mine owner thinks it beneficial to him to work his mines and proceeds to do so, he should be just in the same position as if he had never sold any part of the surface at all." In other words, the mines may be worked as against the railway company just as if they were in the hands of the owner of the surface. Lord Westbury takes the same view, and I need not read what he says. To my mind, that case of *Great Western Ry. Co.* v. *Bennett* (1), has put this interpretation upon the statute, and has determined the right of the mine owner, and by determining that right it has necessarily determined the converse right of the railway company, and that where the railway company have exercised their option of buying the surface land and not the mines, and they have done nothing more, the only right conveyed to them by the conveyance under the statute is one that gives them a right to all the land except the mines, and subject to this, that the mines may be worked against them to the utmost extent, even so that it may let down the railway, provided they are worked in the usual manner of working in the district. If that be all the right which the railway company have, then the defect of the plaintiff's case is a defect in his right, and it is immaterial what is the right of the defendant as between him and his lessor. It may be that the defendant has done wrong to his lessor, but if in doing so he has not invaded the right of the plaintiff, it does not affect the present case. In my opinion this case ought to be determined in favour of the defendant on this ground, that whatever the defendant has done he has not interfered with any right of the plaintiff. I therefore prefer the judgment of Manisty, J., to that of Denman, J.

BOWEN, L.J. This is a very intricate matter which raises some difficulty. In the first place the subject matter is the

(1) Law Rep. 2 H. L. 27.

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right to support, which is an obscure one at all times, and next, at the time of creating it there was an Act of Parliament which affects it but which does not deal with it in express terms. In the present case certain minerals were let to the defendant in 1865 by the landowner. A railway company subsequently served a notice to treat on that landowner, and under the powers of their Act took all the land he had not demised. The plaintiff became the ultimate purchaser from the railway company of part of such land which was superfluous land, and he has brought this action against the defendant for letting down the surface. The answer of the defendant is that you the plaintiff have no right to sue me because you claim only under the railway company, and the effect of the Railways Clauses Consolidation Act, 1845, is to liberate me from all previous rights against me for support. Now we have to consider whether that is a good answer. The learned judge at the trial thought that it was not, and the Divisional Court were divided in opinion.

I think that one must consider, in the first place, the different ways by which persons may acquire an interest in the surface land. Primâ facie the owner of the land has everything under the sky down to the centre of the earth, but there are certain rights of support which follow as incident thereto when nothing is known about the origin of such rights. Supposing land is found to be divided so that the portion which is above belongs to one person, and the portion which is below belongs to another, and nothing is known about the origin of the rights, primâ facie the land above has as an incident to the property a right to support from the land below. Where the origin of the rights is known, the rights must depend on the deed, instrument or Act of Parliament which severed the upper portion of the land from the lower, and created the rights. This must necessarily be so, because an owner of land may carve it out as he likes, and may grant the minerals reserving the right of support to the surface, or he may grant them so that the grantee may be allowed to let down the surface, or he may demise the minerals so as to give the lessee a right to take them without being liable for any injury his taking them may cause to the surface. It is necessary, therefore, to look to the instrument creating the right

in order to see how far the right extends to take the minerals, and how far the right of support is preserved. All depends upon the terms of the instrument, but generally where there are nothing but the general words of demise, I should think that the true effect of such words would be to give to the lessee of the mine the whole of the minerals, reserving to the owner a right to support the surface by way of an implied grant. That seems to me to be the effect of the demise in this case from Penson to Clayton. What I have said is, I think, consistent with the language of Lord Wensleydale in *Rowbotham* v. *Wilson* (1), which is cited by Lord Blackburn in *Smith* v. *Darby* (2). "There is no doubt," says there Lord Wensleydale, "that primâ facie the owner of the surface is entitled to the surface itself and all below it ex jure naturae: and those who claim the property in the minerals below, or any interest in them, must do so by some grant from or conveyance by him, or it may be from the Crown, as suggested by Lord Campbell in the case of *Humphries* v. *Brogden* (3). The rights of the grantee to the minerals, by whomsoever granted, must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. Primâ facie it must be presumed that the minerals are to be enjoyed, and therefore that a power to get them must also be granted or reserved as a necessary incident. It is one of the cases put by Sheppard (Touchstone, chap. 5, p. 89) in illustration of the maxim, "quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit," that by the grant of mines is granted the power to dig them. A similar presumption primâ facie arises that the owner of the mines is not to injure the owner of the soil above by getting them, if it can be avoided. But it rarely happens that these mutual rights are not precisely attained and settled by the deed by which the right to the mines is acquired; and then the only question would be as to the construction of that deed, which may vary in each case." Now applying what I have said to the grant of the surface of the land, too much stress cannot be laid upon what has been pointed out by the Master of the Rolls, that the surface means not the

(1) 8 H. L. C. 348, at p. 360. (2) Law Rep. 7 Q. B. 716, at p. 722.
(3) 12 Q. B. 739; 20 L. J. (Q.B.) (N.S.) 10.

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mere plane surface but all the land except the mines. Then what are the rights of such surface owners where there are minerals? First, there may be the surface owner who may have both the surface and the mines; secondly, there may be the surface owner who is entitled to the ordinary right of support, not because there is a deed, but because it is not known what was the origin of the severance. Thirdly, there may be the surface owner who has the right to support created by the document which effected the severance, and in that case the extent of the right of support must depend on the terms of the document and their true construction. Lastly, there may be the surface owner who has no right to support at all, because he has given it away.

Now these being the four classes of surface owners, there is a purchaser which is a railway company, and I will take the case first of a railway company which does not purchase under the compulsory powers of their Act. What in that case does such company get from the surface owner? first, they get only what he has got to give, and secondly, what he intended to give, and as to that last one must look at and construe the deed of conveyance. In each case, assuming that it is to be governed by the intention of the parties, the presumption of law is, to use the language of Lord Wensleydale: "quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit." Let us take each of the above classes of surface owners. With respect to the first, where such owner has both the land and the minerals and can therefore give everything, if the purchaser were not a railway company, the law would imply that he gave all that was required for the natural enjoyment of the land, and if the purchaser were a railway company who bought the land for the purpose of their railway, it would according to the *Caledonian Ry. Co.* v. *Sprot* (1), imply that he gave them the right to such support as was necessary to carry out the object for which the land was bought. As to the second class, where the surface owner has the right to support as incident to his ownership because nothing is known to the contrary, he cannot give the railway company at the expense of the mine owner a right to

(1) 2 Macq. Sc. App. 449.

support for the railway, but only a right to the support of the surface. The surface owner in the third class is one whose right to support depends on the document, and if by virtue of it he can give the right to support he gives it to the railway company. I wish to observe that where he was the lessor of the mine, and has such right to support created by the deed by which he leased the mines, he transfers the right to support to the railway company to whom he has conveyed the surface, not because the covenant between his lessee and himself runs with the land, but because, if such was the intention of the parties, the railway company are entitled to the benefit of any covenant express or implied between the lessor and lessee. The surface owner in the fourth class has no right to support, and therefore he clearly cannot give the railway company more than the mere right to the surface.

I will now proceed to notice how far the Act of Parliament affects the question in the present case. The first observation I have to make on the sections which have been referred to is that they must not be treated as dealing only with matters between the railway and one class of surface owners, for it would be wrong if one did not remember that there are several classes of surface owners, and that these sections are intended for the protection both of the railway company and of the surface owners.

Now, but for the language of Lord Westbury in *Great Western Ry. Co.* v. *Bennett* (1), I should not have come to the conclusion that s. 77 would by itself have affected the right to support in a transfer from the surface owner to a railway company. It deals with the mines and minerals, and not with the right to support at all, but still after what Lord Westbury has expressed, and the inclination of the Master of the Rolls to agree with him, I should not have had any confidence in my view of the 77th section, were it not for the opinion of Lord Selborne in *Dixon* v. *Caledonian and Glasgow Ry. Co.* (2) upon the corresponding sections of the Scotch Act. He there says, "the first clause, s. 70" (which answers to this s. 77 of the English Act), "says that an ordinary conveyance of land for the purposes of the railway shall not be held to carry with it to the railway company

(1) Law Rep. 2 H. L. 27. (2) 5 App. Cas. 820, at p. 829.

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a right to subjacent mines and minerals unless the same shall have been expressly purchased. I need not more particularly refer to that, and I will only add that as I understand that clause and the next there would be nothing in those sections if they stood alone to deprive a railway company purchasing the surface from the owner of the land of the ordinary right to support from the subjacent strata, though those subjacent strata were reserved and excepted in favour of the landowner." He afterwards refers to s. 72 corresponding with s. 79 of the English Act, and says that (1) " it is a clause which has the most important office of taking away that right to support which, if there had been nothing said in that section, would have remained."

That brings me to s. 79, which I think is the cardinal section in the present case. That section and section 78 read together form the charter of miners' rights, and in *Great Western Ry. Co.* v. *Bennett* (2) they have been called a code of the right of mine owners within forty yards of the railway. I had some doubt at first of their effect on land purchased by the railway company which was outside such forty yards, and I still am not sure that the decision in the case of *Great Western Ry. Co.* v. *Bennett* (2) covers that point, but that difficulty does not arise here because the land in this case is within that distance. In that case of *Great Western Ry. Co.* v. *Bennett* (2) the surface and mine owner was one and the same person who had not sold the mines to the railway company when they purchased of him the surface land. Bennett, to whom he had afterwards conveyed the mines under the railway, gave the railway company notice according to s. 78 of his intention to work them, and the question arose what was the compensation to which he was entitled. Was he entitled to compensation on the basis that the landowner had parted with the land to the railway company with a right to support the surface only, or to support the surface and the railway or not at all, and the House of Lords decided that he was entitled to compensation on the basis that the landowner had not parted with the right to support at all. That decision involved this, that sect. 79 applied to all mine owners who at the time of the purchase by the railway company were also surface owners. In the present case the

(1) 5 App. Cas. p. 831. (2) Law Rep. 2 H. L. 27.

mine owner did not come within the first class, which is when he is both surface owner and mine owner, but why should not the same principle apply to a case in which before the conveyance to the railway company the minerals have been severed from the surface by a demise. Is it a distinction which makes any difference? This point seems to have occurred to the Court of Exchequer Chamber in *Great Western Ry. Co.* v. *Fletcher* (1), where Cockburn, C.J., says, "If indeed prior to the conveyance there was any separation of the surface soil from the minerals the right of support would no doubt belong to the company, because if a landowner parts with the surface soil he does so subject to the obligation of dealing with the substratum so as not to disturb the superincumbent soil. In such case the landowners, having parted with the surface, and there being attached to the ownership of the soil the right to the support of the stratum below, would not be entitled to any compensation for the loss they may sustain in not working the minerals; but that is not the question which we have now to consider." That is an obiter dictum in favour of the present plaintiff, but can it be supported? Take the broadest case: that of a surface owner who has conveyed to a railway company and of a mine owner who is bound to support the surface land, not by any deed, but because nothing is known to the contrary, that is, when the surface owner comes within the second of the classes I have mentioned. Does s. 79 deal with that right to support? It applies to every owner or occupier of any mine within forty yards of the railway, and you must cut down and alter the words of that section in order to deprive the miner of his liberty to work his mine. If that be true of class No. 2 it is also true of class No. 3, and I think on the whole one must interpret s. 79 in the broad way in which the Master of the Rolls has interpreted it. Several objections have been urged to our taking this view of the matter. It has been said that the surface may always be then injured unless there be danger of injuring the works of the railway company, but it does not appear that the consideration of this had any effect on the House of Lords when they construed the Act. Again, it was said that this construction would release the mine owner who had actually

(1) 5 H. & N. 680, at p. 698; 29 L. J. (Ex.) 253.

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covenanted with the original lessor not to let down the surface; but the first answer to that is, that it does not follow that such will be the effect as between him and his lessor, for privity of covenant may still remain; and the second answer is, that the mine owner gets an advantage by reason of the statute, but that is when a railway company approach a mine and the legislature has given ample protection to the railway company for their works, and if they do not think proper to avail themselves of such protection it has left the mine owner to work the mine according to the usual manner of working mines in the district. Therefore the answer to the plaintiff's case is that he cannot sue the defendant.

Judgment reversed.

Solicitor for plaintiff: *A. S. Poyser, for H. A. Poyser, Wrexham.*

Solicitors for defendant: *Abbott, Jenkins & Co., for Lewis & Son, Wrexham.*

W. P.

END OF VOL. XI.

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BANK OF ENGLAND—*Note—Material Alteration—Bonâ fide transfer for value—Rejection by Bank—45 & 46 Vict. c.* 61 (*Bills of Exchange Act*, 1882), *ss.* 64, 89—*Worthless Document—Action for money paid to Transferor.*] A Bank of England note, which had been materially altered in number and date, was paid to the plaintiffs' bank for value by the defendant, both parties believing the note to be good. The plaintiffs paid away the note, which was afterwards presented at the Bank of England, where the alteration was perceived and payment was refused. The note was returned to the plaintiffs as a bad one, and, after a fortnight spent in tracing the note to the defendant, the plaintiffs demanded payment of it from him, and on the 21st of July, 1882, sued him for the amount.—On the 18th of August, 1882, the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), received the royal assent. By s. 64, where a bill or acceptance is materially altered, without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made the alteration, and subsequent indorsers. Provided that where a bill has been materially altered, but the alteration is "not apparent," and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenor. By s. 89 the provisions of this Act relating to bills of exchange apply, "with the necessary modifications," to promissory notes:—*Held*, that the doctrine as to notice of infirmity in bills and notes was inapplicable to a forged Bank of England note, and that the delay in giving notice of the alteration to the defendant was no ground of defence; that before the Bills of Exchange Act, 1882, the Bank of England was not liable on the altered note: *Suffell* v. *Bank of England* (9 Q. B. D. 555); which was therefore worthless; that s. 64 was not retrospective, and that even if it were so, the "necessary modifications" referred to in s. 89 would exclude Bank of England notes altogether from the operation of s. 64, and that even if the

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proviso of s. 64 would otherwise have affected the altered bank note, the alteration was "apparent," as the Bank of England could at once discern and point out to the holder of the note that it had been materially altered, although the alteration was not obvious to everybody; and, consequently, that the plaintiffs, having received from the defendant a worthless note on which no one could be sued, were entitled to recover in the action for money had and received. LEEDS AND COUNTY BANK *v.* WALKER - - - - - **84**

BANKRUPTCY—*Annulment—Scheme of Settlement of Bankrupt's Affairs—Discharge of Bankrupt—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 28.] When a bankruptcy has been annulled under the Bankruptcy Act, 1869, s. 28, and a scheme of arrangement of the bankrupt's affairs has been approved of by the Court, the bankrupt is discharged from his debts, and no action is maintainable against him in respect of any debt provable under the bankruptcy. GILBEY *v.* JEFFRIES - - - - - - **C. A. 559**

2. —— *Effect of Order of Discharge—Debt incurred by the Fraud or Breach of Trust of a Partner—Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *s.* 49.] The 49th section of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), which enacts that "an order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or breach of trust," is not confined to a fraud or breach of trust committed by the bankrupt personally.—Therefore, where a debt has been incurred by one of several partners for which the partnership is liable, and the partnership goes into liquidation under the Bankruptcy Act, 1869, a partner who has received his order of discharge is not thereby released from such debt if it was incurred by fraud, though he himself was innocent of such fraud. COOPER *v.* PRICHARD **C. A. 351**

3. —— *Landlord and Tenant—Bankruptcy of Tenant (Bankruptcy Act*, 1869), 32 & 33 *Vict. c.* 71, *ss.* 23, 24—*Non-disclaimer after Notice—Assignment by Trustee to Pauper.*] Although a trustee in bankruptcy, who has taken actual possession of leasehold property of the bankrupt, receives notice from the landlord to disclaim the lease under the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), but does not disclaim, he may nevertheless relieve himself of liability to the landlord by assigning the lease, even without having previously offered to surrender it, and the mere fact that the trustee knows the assignee to be a pauper will not invalidate such assignment. HOPKINSON *v.* LOVERING - - - - - - - - **92**

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before the receiver took possession, judgment was signed against F. and his separate property taken in execution for a sum exceeding 50*l.*:—*Held*, that F. was not at the time of the execution a "trader" within the meaning of s. 87 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71.) DAWE *v.* VERGARA - - - - - - - **241**

5. —— *Bankruptcy Act*, 1869 (32 & 33 *Vict. c.* 71), *ss.* 6, 87—*Seizure and Sale—"Proceeds" of Sale—Notice to Sheriff of Petition in Bankruptcy—Sale made on two different Days.*] Sect. 87 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), enacts that, where the goods of any trader have been taken in execution in respect of a judgment for a sum exceeding 50*l.*, and *sold*, the sheriff shall retain the *proceeds of such sale* in his hands for a period of fourteen days, and, upon notice being served on him within that period of a bankruptcy petition having been presented against such trader (followed by an adjudication), shall hold the proceeds of such sale, after deducting expenses, on trust to pay the same to the trustee. —On the 29th of December, 1882, an execution was issued at the suit of the plaintiff against the defendants, traders, upon a judgment for 87*l.* 19*s.* 4*d.* debt and costs, and lodged with the sheriff, who on the same day seized certain goods of the defendants and sold them on the 10th of January, 1883, realizing by that sale 41*l.* 12*s.* 7*d.* On the 12th of January other goods of the defendants which were upon other premises occupied by them were sold under the fi. fa., and realized 74*l.* 10*s.* 10*d.* On the 24th of January, 1883, a petition in bankruptcy was presented against the defendants, under which they were adjudicated bankrupts on the 19th of February. The sheriff had notice of the petition on the 25th of January:—*Held*, that the trustee was entitled to the whole proceeds, as the "sale" contemplated by s. 87 of the Bankruptcy Act, 1869, was not completed until the 12th of January, within fourteen days from the receipt by the sheriff of notice of the filing of the petition. JONES *v.* PARCELL - - - - - **430**

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BILL OF SALE—*Assignment of future Crops—Landlord and Tenant—Surrender—Rights of Bill of Sale Holder against Landlord of Grantee.*] B., the tenant of a farm, by bill of sale made in September, 1880, assigned to the plaintiff his stock-in-trade and effects on the said farm, together with all the growing and other crops "which at any time thereafter should be in or about the same or any other premises" of the said B. On the 25th of April, 1881, the defendant, who was B.'s landlord of the said farm, distrained for rent, and afterwards agreed with B. to withdraw such distress and to forego all claim for rent on B. agreeing to give up possession and surrender the tenancy to the defendant on the 24th of June then next. The defendant accordingly withdrew the distress, and on the 24th of June he took possession of the farm according to the said agreement, and afterwards cultivated the crops which were growing there, and when they arrived at maturity he reaped and sold them. Between the time he withdrew the distress and the time he took possession of the farm, viz., on the 19th of May, the defendant had notice for the first time of the plaintiff's claim under the bill of sale to the growing crops. The amount of rent which would have been due to the defendant had the tenancy continued, and the expenses he incurred in cultivating and reaping the crops, exceeded their market value when sold:—*Held*, in an action by the plaintiff against the defendant for the value of these crops, that the description in the bill of sale of the future crops on the farm was sufficiently specific to make a valid assignment of them in equity.—*Held*, also, that, assuming that the plaintiff had a right in equity to such crops as against the defendant, yet that such right was subject to the payment of the rent and of the expenses of cultivating and reaping the crops, and as such rent and expenses exceeded the value of the crops the plaintiff had not been injured, and had no cause of action against the defendant. CLEMENTS *v.* MATTHEWS - - - **C. A. 808**

2. —— *Building Agreement—Clause vesting Materials in Landowner—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Amendment Act*, 1882 (45 & 46 *Vict. c.* 43).] An agreement, by a clause in an ordinary building contract, that all building and other materials brought by the builder upon the land shall become the property of the landowner is not a bill of sale within the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31). REEVES *v.* BARLOW - - - - 610

3. —— *Bills of Sale Act* (1878) *Amendment Act*, 1882 (44 & 45 *Vict. c.* 43), *ss.* 7, 9—*Instrument not in accordance with the Form given by the Act.*] The Bills of Sale Act (1878) Amendment Act, 1882, s. 9, provides that a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void, unless made in accordance with the form in the schedule to the Act annexed.—The Act also

BILL OF SALE—*continued.*

provides (s. 7) that personal chattels assigned under a bill of sale shall not be liable to be seized by the grantee for any other than the following causes, viz., amongst others: 1. If the grantor shall make default in payment of the sum or sums of money thereby secured at the time therein provided for payment, or in the performance of any covenant or agreement contained in the bill of sale, and necessary for maintaining the security. 2. If the grantor shall become a bankrupt, or suffer the said goods or any of them to be distrained for rent, rates, or taxes. 4. If the grantor shall not, without reasonable excuse, upon demand in writing by the grantee, produce to him his receipts for rent, rates, and taxes.—By a bill of sale the grantor assigned to the grantee the goods enumerated in the schedule thereto, by way of security for the payment of 300*l.* money advanced and 180*l.* for agreed capitalised interest thereon at the rate of 60 per cent. per annum, making together the sum of 480*l.*, by instalments of a certain amount, at certain specified dates. The grantor also covenanted, amongst other things, that she would deliver to the grantee the receipts for rent, rates, and taxes, in respect of the premises on which the goods assigned might be, when demanded "in writing or otherwise;" and also that she would not make any assignment for the benefit of creditors, or file a petition for liquidation or composition with creditors, or do or suffer anything whereby she should render herself liable to be made or become a bankrupt. It was also by the said bill of sale agreed, that if the grantor should break any of the covenants, all the moneys thereby secured should immediately become due and be forthwith paid to the grantee, and it was provided that the chattels assigned should not be liable to seizure for any cause than those specified in the Bills of Sale Act (1878) Amendment Act, 1882:—*Held*, that the bill of sale was void, as not made in the form given in the schedule:—*Held*, also, that the bill of sale could not be supported, inasmuch as it enabled the grantee to seize the goods upon a failure by the grantor to produce the receipts for rent, rates, and taxes, after a verbal demand. Judgment of the Queen's Bench Division (10 Q. B. D. 414) affirmed. DAVIS *v.* BURTON - - - - **C. A. 537**

4. —— *Bills of Sale Act*, 1878, *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 7—*Bill of Sale registered before the Commencement of the Act—"Reasonable excuse" for Non-production of Receipt for Rent—Relief against Seizure of Goods.*] The provisions of s. 7 of the Bills of Sale Act, 1878, Amendment Act, 1882, apply to goods seized after the date of the commencement of the Act under a bill of sale executed and registered before such date.—Where the grantor of a bill of sale did not, upon demand in writing by the grantee, produce a receipt for rent which had only become due a few days, and of which it appeared the landlord had not yet required payment:—*Held*, that the grantor had not "without reasonable excuse" failed to produce his last receipt for rent, within the meaning of the 4th sub-section of s. 7 of the Bills of Sale Act, 1878, Amendment Act, 1882.—Where, after goods had

BILL OF SALE—*continued.*
been seized under a bill of sale for default in payment of instalments due thereunder, the grantor offered to pay the amount due, but the grantee refused to receive the same:—*Held*, that the Court had power, under the above-mentioned section, to make an order restraining the grantee from selling the goods on condition that the amount due was paid. *Ex parte* Cotton 301

BOROUGH—Liability to county rate - 490
See County Rate.

BUILDING AGREEMENT—Clause vesting materials in landowner—Bill of Sale requiring registration - - - - 610
See Bill of Sale. 2.

BURIAL BOARD—*Appointment of Burial Board*—18 & 19 *Vict. c.* 128, *s.* 12.] By s. 12 of 18 & 19 Vict. c. 128, a meeting in the nature of a vestry of any district not separately maintaining its own poor, which has heretofore had a separate burial ground, may appoint a burial board, which shall have the same powers as if such district had been a parish separately maintaining its own poor:—*Held*, that the powers given by the section did not apply to a district forming part of an area over which a burial board already exercised jurisdiction, and therefore that no burial board could be legally constituted in such a district. The Queen *v.* Overseers of Tonbridge - - - 134

CASES:—*Cawthorne* v. *Cordrey* (13 C. B. (N.S.) 406; 32 L. J. (C.P.) 152) distinguished
See Frauds, Statute of. [123

—— *Dobbs* v. *Sheffield Waterworks Co.* (10 Q. B. D. 327) followed - - - 195
See Water Rate.

—— *Gambier* v. *Overseers of Lydford* (3 E. & B. 346; 23 L. J. (M.C.) 69) approved 145
See Poor-rate.

—— *Jennings* v. *Hammond* (9 Q. B. D. 225) approved - - - - 563
See Company.

—— *Johnson* v. *Emerson* (Law Rep. 6 Ex. 329) commented upon - - - 674
See Malicious Prosecution.

—— *Kendillon* v. *Maltby* (C. & M. 402; 2 M. & R. 438) dissented from - - 588
See Defamation. 2.

—— *Padstow Total Loss and Collision Insurance Association* (20 Ch. D. 137) followed 563
See Company.

—— *Selmes* v. *Judge* (Law Rep. 6 Q. B. 724) followed - - - - 788
See Local Government Acts. 5.

—— *Stockport Waterworks Company* v. *Potter* (3 H. & C. 303) approved - - 155
See Watercourse.

—— *Taylor* v. *Meltham Local Board* (47 L. J. (C.P.) 12) distinguished - - 286
See Local Government Acts. 3.

—— *Todd, Ex parte* (3 Q. B. D. 407) overruled
See Licensing Acts. [638

—— *Vavasseur* v. *Krupp* (15 Ch. D. 474) overruled - - - - - 464
See Practice.

CASES—*continued.*
—— *Waterhouse* v. *Keen* (4 B. & C. 200) followed - - - - 788
See Local Government Acts. 5.

—— *Whitchurch, Ex parte* (6 Q. B. D. 545) distinguished - - - - 191
See Local Government Acts. 6.

—— *White* v. *Justices of Coquetdale* (7 Q. B. D. 238) overruled - - - 638
See Licensing Acts.

CENTRAL CRIMINAL COURT—Mandamus 479
See Mandamus.

CHARTERPARTY—Lay days—Frost preventing loading - - - - 543
See Ship. 3.

—— Discharge of cargo—Discharge in dock "if sufficient water" - - - 782
See Ship. 2.

COLLISION—Negligence—"Peril of the sea" 47
See Ship.

COMPANY—*Unregistered Company—Loan Society—Association of more than Twenty Members—Association having for its Object the Acquisition of gain—Gain by Individual Members—Illegality—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 4.] T. was the president of a loan society. The objects of the society were to form a fund, from which money might be advanced to enable shareholders to build or purchase a dwelling-house or other buildings, or to lend money to each other on approved personal security; five per cent. interest was to be charged on all moneys advanced by the society. The society consisted of more than twenty members, and was not registered under any statute. The society advanced a sum of money to the defendants, who signed promissory notes by way of security for the loan; and when T. went out of office, he indorsed the promissory notes to the plaintiff, who succeeded him. The plaintiff having sued upon the notes for the benefit of the society:—*Held*, that the society not having been registered, was rendered illegal by the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4, it being an association having "for its object the acquisition of gain," within the meaning of that enactment; that the plaintiff could not be in a better position than the society, and therefore could not recover upon the promissory notes.—*In re Padstow Total Loss and Collision Assurance Association* (20 Ch. D. 137) followed.—*Jennings* v. *Hammond* (9 Q. B. D. 225) approved. Shaw *v.* Benson [C. A. 563

—— Malicious prosecution—Petition to wind up—Reasonable and probable cause 674
See Malicious Prosecution.

COMPENSATION — Local Government Acts—Time for determining liability - 735
See Local Government Acts.

CONTEMPT OF COURT—Solicitor—Privilege 545
See Practice. 4.

CONTRACT — *Local Government Acts — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 174—*Certificate of Engineer—Wallasey Improvement Acts*, 1858 (21 & 22 *Vict. c. lxiii.*), *and* 1861 (24 *Vict. c. iv.*).] The Wallasey Local Board, a local board of health under the Public Health Act, 1848 (11 & 12 Vict. c. 63), and an urban sanitary

CONTRACT—*continued.*

authority under the Public Health Act, 1875 (38 & 39 Vict. c. 55), were authorized by the Wallasey Improvement Acts, 1858 and 1861, to acquire and work certain ferries between Liverpool and the Cheshire side of the Mersey, amongst others Seacombe Ferry. In May, 1878, they entered into a contract under their seal with the plaintiff for the removal by dredging of a large quantity of soil from the bed of the river at Seacombe Ferry for 5000*l.*, the work to be executed under the direction and to the satisfaction of the engineer of the board by a given day, subject to an extension of time (as the engineer might think reasonable) in case the staging on the site to be dredged (which belonged to another contractor) should not be removed in time to enable the plaintiff to complete the work by the day named. —The general superintendence of the works connected with their ferries was intrusted by the board to the engineer, subject to the control of a "ferry-works committee" appointed under s. 200 of the Public Health Act, 1875, and acting under the powers conferred by that Act. The contract between the board and the plaintiff contained a clause that, "if any difference shall arise between the local board and the contractor concerning the work hereby contracted for, or any part thereof, *or concerning anything in connection with this contract*, such difference shall be referred to the engineer, and his decision thereon shall be final and binding on the local board and the contractor."—In answer to a complaint by the plaintiff on the 15th of January, 1879, that his progress was obstructed by the non-removal of the staging, the engineer wrote, "I note that you are put to extra expense consequent on this delay, and I am prepared to compensate you for it on settlement." This was reported by the engineer to the ferry works committee, with an intimation that, "inasmuch as the plaintiff was not able to complete his contract until the piles had been removed, the board would be liable for the rent of the dredgers until the plaintiff could recommence." The committee thereupon by a minute which was subsequently confirmed by the board ordered the engineer to use all speed in the removal of the piles. The staging referred to was not in fact removed until September, 1879, and the plaintiff was put to considerable expense in consequence of this delay, by the detention of his plant and for the hire of dredgers and machinery, &c. The works were completed on the 11th of November.—After some correspondence between the plaintiff and the engineer as to the amount due to the former on account of the contract and for delay, the latter gave the plaintiff the following certificate:—"I certify that Mr. George Lawson has completed to my satisfaction the work which he contracted to execute at Seacombe Ferry for the Wallasey Local Board, and that he is therefore entitled to the sum of 500*l.*, being the balance of the sum of 5000*l.* mentioned in his contract after deducting 4500*l.* already paid him on account; and I further certify that Mr. George Lawson is entitled to the further sum of 565*l.* 19*s.* 2*d.* for extra work executed by him at Seacombe Ferry in connection with the said contract, being the balance of 1324*l.* 10*s.*, after deducting 758*l.* 10*s.* 10*d.* paid by the Wallasey Local Board

CONTRACT—*continued.*

at his request for the hire of dredger, tug, hoppers, and insurance; and that such several balances of 500*l.* and 565*l.* 19*s.* 2*d.* are to be received by Mr. George Lawson in full satisfaction of all his claims on the Wallasey Local Board for work executed by him at Seacombe pursuant to the contract and *in connection with it*."—The plaintiff declined to accept those sums in satisfaction, but claimed a balance of 2489*l.* 3*s.* 11*d.*—It was admitted that none of the forms prescribed by the Public Health Act, 1875, s. 174, were complied with, that there was no consideration for any contract entered into or action taken by the defendant board except as appeared in the case, and that no document other than the original contract was under the seal of the board:—*Held*, first, that, looking at the terms of the contract, which provided for a definite amount of dredging to be done by a certain time, with power to the engineer to extend that time as he should think reasonable in case of the non-removal of staging, there was an implied contract on the part of the board that the removal of the staging should not be unreasonably delayed; and that for this breach, if proved, the plaintiff would be entitled to recover damages from the defendants,—the proper measure of such damages being the loss which the plaintiff had unavoidably sustained in consequence of such unreasonable delay; secondly, that this was not a difference "concerning a matter in connection with the contract," as to which the decision of the engineer was to be conclusive. LAWSON *v.* WALLASEY LOCAL BOARD - - - - **229**

CONVERSION—Demand and refusal—Limitations - - - - - **99**
See LIMITATIONS.

COPYHOLD—*Arbitrary Fine—Omission to demand Fixed Sum—Improved Annual Value.*] A lord, who is entitled by the custom of the manor to a reasonable fine upon admission to a copyhold tenement, may demand and recover such fine by the description of the improved annual value for a certain number of years of the tenement to which the admittance relates, and without stating in money the precise amount of the fine.—Decision of the Queen's Bench Division (10 Q. B. D. 398) affirmed. FRASER *v.* MASON - **C. A. 574**

COPYRIGHT—*Musical Composition—Dramatic Piece—Place of dramatic Entertainment—3 & 4 Wm. 4, c. 15, ss. 1, 2—5 & 6 Vict. c. 45, ss. 20, 21.*] The 3 & 4 Wm. 4, c. 15, s. 1, gives the author of a dramatic piece not printed or published the sole liberty of representing it at any place of dramatic entertainment, and s. 2 enacts that if any person shall, during the continuance of such sole liberty, without the consent of the author, represent such piece at any place of dramatic entertainment, "every such offender" shall be liable for each and every such representation to the payment of not less than 40*s.* or to the full amount of the benefit arising from such representation or the loss sustained therefrom, whichever shall be the greater damages.—The 5 & 6 Vict. c. 45, by s. 20, enacts that the 3 & 4 Wm. 4, c. 15, shall apply to musical compositions, and that the sole liberty of representing any dramatic piece or musical composition shall be the property of the author and his assigns for the term then mentioned, and by

COPYRIGHT—*continued.*

s. 21 enacts that the person who shall have such sole liberty of representing such dramatic piece or musical composition, "shall have and enjoy the remedies given and provided by 3 & 4 Wm. 4, c. 15, as if the same were re-enacted" in that Act:—*Held*, affirming the judgment of the Queen's Bench Division (Cotton, L.J., dissenting), that the person whose right under s. 20 of 5 & 6 Vict. c. 45, to such sole liberty of representing a musical composition, has been infringed, is entitled to recover the penalty of 40*s.* given by s. 2 of 3 & 4 Wm. 4, c. 15, although such musical composition has not been represented at a place of dramatic entertainment. Wall *v.* Taylor. Wall *v.* Martin - - - - **C. A. 102**

2. —— *Photograph—"Author"—Joint Authors—Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *ss.* 1, 4—*Amendment of Pleadings—Costs.*] A. and B. carried on business in copartnership as photographers under the firm of the L. Company. They did not take photographs themselves, but employed managers and a large staff of photographic artists and assistants. One of their managers, thinking that the photograph of the Australian Cricketers would sell well, arranged for the photographs to be taken without any payment being made for taking them, and sent one of the artists in the employ of the firm to take the negative. From this negative the photograph was in the usual way produced and sold by the firm in the ordinary course of business; and A. and B. registered themselves under the Copyright Act, 1862, in their individual names as the proprietors and authors of the photograph. In an action by the firm to restrain the pirating of their copyright in the photograph:—*Held*, that A. and B. were not the authors of the photograph.—*Semble*, that the person who took the negative was the author.—Two or more persons may be registered under the Act as the "authors" of a painting, or a drawing, or a photograph; but in such a case, *quære*, whether the copyright would subsist for the joint lives of the authors, and seven years afterwards, or for the lives and life of the survivors and survivor and seven years afterwards.—An amendment to the pleadings made at the trial by the Court, mero motu, in order to raise the real point at issue, is no ground for departing from the usual rule as to the costs of the action. Nottage *v.* Jackson - - - - - - **C. A. 627**

COSTS—Amendment of pleadings - - **627**
See Copyright.

—— Arbitration—Lands Clauses Act - **345**
See Lands Clauses Act.

—— Order for payment by solicitor—Appeal
See Practice. 5. [373

—— Solicitor—Delivery of bill after payment
See Solicitor. [377

COUNTERCLAIM—Discontinuance of action **464**
See Practice. 9.

COUNTY RATE—*Borough, Liability to County Rate—Main Roads—Middlesbrough Extension and Improvement Acts*, 1866 (29 & 30 *Vict. c. cxliii.*) *and* 1874 (38 *Vict. c. cviii.*)—*Highways and Locomotives (Amendment) Act* 1878 (41 & 42 *Vict. c.* 77), *s.* 13.] By a local Act, passed in 1874, the limits of the borough of Middlesbrough were

COUNTY RATE—*continued.*

extended, and all lands, &c., within the extended area, and all persons in respect of the same, were exempted "from all county rates save only in respect of the purposes for which any county rates are now leviable within the existing borough;" and the Act further provided that the urban sanitary authority should be liable to the maintenance and repair of all streets and roads being public highways within the extended area, and that the inhabitants should not, in respect of any lands, &c., within that area, be liable to any payment in respect of the making or repairing of any highway beyond the limits thereof. At the time of the passing of the Act general county rates were leviable within the existing borough for all purposes for which general county rates could be levied in any part of the riding, but those purposes did not include the maintenance of any main or other roads outside the limits of the borough. By s. 13 of the Highways and Locomotive (Amendment) Act, 1878, any road which has ceased to be a turnpike road in manner described by the Act, shall be deemed to be a "main road," and one half of the expense incurred by the highway authority in the maintenance of such road shall, as to every part thereof within any highway area, be contributed out of the county rate:—*Held*, that the provisions of the local Act did not exempt the inhabitants of the extended area of the borough from liability to pay county rates, under s. 13 of the Highways and Locomotives (Amendment) Act, 1878, in respect of the maintenance of main roads outside the limits of the extended area. Overseers of Middlesborough *v.* Justices of North Riding of Yorkshire - - **490**

COVENANT—Quiet enjoyment—Decree in equity —Disturbance of possession - **695**
See Vendor and Purchaser.

CRIMINAL LAW—24 & 25 *Vict. c.* 100, *s.* 57—*Bigamy—Evidence, presumption of continuance of cohabitation.*] The prisoner was convicted of bigamy. It was proved that he had married W. in 1865, and lived with her after the marriage, but for how long was not known; that in 1882, W. being still alive, he had gone through the form of marriage with another woman, but there was no evidence as to the prisoner and W. having ever separated or as to when, if separated, they last saw each other:—*Held*, by the Court (Lord Coleridge, C.J., Pollock, B., Manisty, Lopes, and Stephen, JJ.), that the prisoner was rightly convicted. The Queen *v.* Jones - **C. C. R. 118**

2. —— *Defamation—Prosecution for Newspaper Libel without Fiat of Director of Public Prosecutions — Information filed by Order of Court—Newspaper Libel and Registration Act*, 1881 (44 & 45 *Vict. c.* 60), *s.* 3.] The Newspaper Libel and Registration Act, 1881 (44 & 45 Vict. c. 60), s. 3—which enacts that no criminal prosecution shall be commenced against any proprietor, publisher, editor, or any person responsible for the publication of a newspaper for any libel published therein, without the written fiat or allowance of the Director of Public Prosecutions in England or Her Majesty's Attorney General in Ireland being first had and obtained—does not apply to criminal informations for libel filed by order of the Court at the instance of private

CRIMINAL LAW—*continued.*
prosecutors. So *held* by Field, J., Denman, J., and Mathew, J. (Lord Coleridge, C.J., and Hawkins, J., dissenting). THE QUEEN *v.* YATES - 750

3. —— *Larceny — Water stored in Pipes, whether the subject of Larceny at Common Law.*] Water supplied by a water company to a consumer, and standing in his pipes, may be the subject of a larceny at common law. FERENS *v.* O'BRIEN 21

CROPS—Assignment — Bill of sale — Distress — Landlord and tenant - - 808
See BILL OF SALE.

DAMAGE—Defamation - - - 407
See DEFAMATION. 3.

DAMAGES, MEASURE OF—Principal and agent —Consignment of goods not of description ordered - - - 797
See PRINCIPAL AND AGENT.

DEBTOR AND CREDITOR—*Accord and Satisfaction—Contract—Consideration—Contract by Creditor to take less than sum due, whether valid.*] Judgment for a specific sum having been obtained by the plaintiff in an action, an agreement in writing was made between the plaintiff and defendant whereby, in consideration that the defendant would pay part of the sum on the signing of the agreement and the remainder to the plaintiff or her nominee by equal half-yearly instalments, the plaintiff undertook not to take any proceedings on the judgment. The defendant duly performed all the terms of the agreement on his part.—*Held*, by the Court of Appeal, reversing the decision of the Queen's Bench Division, that the agreement was not binding on the plaintiff, there being no consideration for it, and that therefore the plaintiff was entitled to issue execution for interest on the judgment debt. BEER *v.* FOAKES - - - - - C. A. 221

DEFAMATION—*Privilege — Libel — Publication of Privileged Communication by Mistake—Negligence.*] The defendant wrote defamatory statements of the plaintiff in a letter to W. under circumstances which made the publication of the letter to W. privileged, but by mistake the defendant placed it in an envelope directed to another person who received and read the letter. In an action for libel:—*Held*, that the letter having been written to W. under circumstances which caused the legal implication of malice to be rebutted, the publication to the other person, though made through the negligence of the defendant, was privileged in the absence of malice in fact on his part. TOMPSON *v.* DASHWOOD 43

2. —— *Privilege—Words uttered in the course of a Judicial Proceeding—Advocate—Relevancy—Malice.*] No action will lie against an advocate for defamatory words spoken with reference to, and in the course of, an inquiry before a judicial tribunal, although they are uttered by the advocate maliciously and not with the object of supporting the case of his client, and are uttered without any justification or even excuse and from personal ill-will or anger towards the person defamed arising out of a previously existing cause, and are irrelevant to every issue of fact which is contested before the tribunal.—H. was

DEFAMATION—*continued.*
charged before a court of petty sessions with administering drugs to the inmates of M.'s house in order to facilitate the commission of a burglary at it. M. was the prosecutor, and L., who was a solicitor, appeared for the defence of H. There was some evidence, although of a very slight character, that a narcotic drug had been administered to the inmates of M.'s house upon the evening before the burglary, and H. had been at M.'s house on that evening. During the proceedings before the court of petty sessions, L., acting as advocate for H., suggested that M. might be keeping drugs at his house for immoral or criminal purposes. There was no evidence that M. kept any drugs for those purposes:—*Held*, that no action by M. for defamation would lie against L.—*Kendillon* v. *Maltby* (C. & M. 402; 2 M. & R. 438) dissented from. MUNSTER *v.* LAMB - - - - - C. A. 588

3. —— *Slander — Remoteness of Damage — Damage not natural and probable Consequence of Words spoken.*] Claim, that the plaintiff was a candidate for membership of the R. Club, but upon a ballot of the members was not elected; that a meeting of the members was called to consider an alteration of the rules regarding the election of members; that the defendant falsely and maliciously spoke and published of the plaintiff as follows: "The conduct of the" plaintiff "was so bad at a club in M. that a round robin was signed urging the committee to expel" him; "as however" he was "there only for a short time, the committee did not proceed further;" whereby the defendant induced a majority of the members of the club to retain the regulations under which the plaintiff had been rejected, and thereby prevented the plaintiff from again seeking to be elected to the club:—*Held*, upon demurrer, that the claim disclosed no cause of action; for the words complained of, not being actionable in themselves, must be supported by special damage in order to enable the plaintiff to sue; and the damage alleged was not pecuniary or capable of being estimated in money, and was not the natural and probable consequence of the defendant's words. CHAMBERLAIN *v.* BOYD [C. A. 407

4. —— *Slander — Words actionable per se—Innuendo—Criminal Offence—Indictable Offence.*] Words imputing that the plaintiff has been guilty of a criminal offence will support an action for slander, without special damage; and it is not necessary to allege in the statement of claim that they impute an indictable offence. WEBB *v.* BEAVAN - - - - - 609

—— Criminal information — Newspaper libel—Fiat of director of public prosecutions
See CRIMINAL LAW. 2. [750

DEMURRAGE—Construction of charter party
See SHIP. 5. [244

DISTRESS — Fraudulent removal of goods — Termination of tenancy—Possession of tenant - - - - 668
See LANDLORD AND TENANT. 3.

—— Illegality—Lodgers' Goods Protection Act
See LANDLORD AND TENANT. [421

DISTRESS DAMAGE FEASANT—*Impounding on Premises—Tender of Damages—Excessive Demand—Payment under Protest—Action for Money had and received — Extortion.*] Where an animal distrained as damage feasant is impounded on private premises, and not in a common pound, a subsequent tender of sufficient compensation for the damage actually done is good, and if the distrainor, by demanding an excessive sum for damages as the condition of his release of the animal, obtains payment of such sum from the owner, such payment is not voluntary, and the sum paid may be recovered in an action for money had and received. Green *v.* Duckett **275**

EASEMENT—*Prescription Act* (2 & 3 *Wm.* 4, *c.* 71), *s.* 2—*Right to use Way for the Removal of Timber—User at long Intervals—"Enjoyment for full period of Twenty Years."*] In an action where a right of way was claimed under the Prescription Act (2 & 3 Wm. 4, c. 71), s. 2, in respect of twenty years' user as of right, it appeared that the way had only been used by the party claiming it, the defendant, for the removal of wood cut upon an adjoining close. The wood was cut upon this close at intervals of several years; the last cutting having been in the year in which the action was commenced, the one next previous fifteen years before, and the next at another interval of fifteen years. Between these intervals the road was occasionally stopped up, but the defendant used it as often as he wished while the wood was being cut:—*Held*, that there had not been an uninterrupted enjoyment of the way for twenty years within the meaning of s. 2 of the Prescription Act, which did not apply to so discontinuous an easement as that claimed. Hollins *v.* Verney - - - - **715**

EMPLOYER AND WORKMAN—Summary proceeding before justices—Neglect of seaman to join ship - - - **225**
See Ship. 6.

ESTOPPEL — *Negligence — Proximate Cause — Railway Company—Delivery Order.*] The defendants received a consignment of wheat and issued a delivery order for it, which came into the hands of B. Upon this delivery order B. obtained advances from the plaintiffs. Shortly afterwards the defendants issued a second delivery order in respect of the same consignment of wheat. The two delivery orders were different, and such as might be reasonably supposed to relate to distinct consignments of wheat. Upon this second delivery order B. obtained further advances from the plaintiffs, who were under the belief that the delivery orders related to distinct consignments of wheat. B. having afterwards become insolvent:—*Held*, that the defendants were estopped by their negligence from shewing that the two delivery orders related only to one consignment of wheat, and that they were liable to compensate the plaintiffs for the loss sustained by them through the advances to B. Coventry *v.* Great Eastern Railway Co. - **C. A. 776**

EVIDENCE—Contract—Signature by agent for principal and in his own right - **651**
See Principal and Agent. 2.

—— Malicious prosecution—Burden of proof
See Malicious Prosecution. [**79, 440**

FALSE REPRESENTATION — Sale of land—Action for damages - - **255**
See Fraud.

FRAUD—*False Representation, Action for, Moral Fraud essential to—Sale of Land—Compensation for Misdescription, Claim of, after Completion.*] In an action for damages for a misrepresentation with reference to the subject-matter of a contract, in the absence of any breach of contract or warranty, fraud is an essential element of the cause of action.—There is no such thing as "legal" fraud in the absence of moral fraud.—A vendor of real property, during the negotiations for the sale, made a representation to the purchaser, bonâ fide, and believing it to be true, that the pieces of land sold contained three acres, whereas in truth they contained a less quantity. After completion of the contract and execution of the conveyance, the purchaser sought to recover compensation from the vendor for the false representation:—*Held*, that, after completion, such compensation could not be recovered unless there had been fraud or the breach of some contract or warranty contained in the conveyance, and, therefore, the action would not lie. Joliffe *v.* Baker **255**

FRAUDS, STATUTE OF, s. 4—*Contract not to be performed within a Year—Void Contract—Implied Contract — Part Performance — Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 7.] A contract to serve for one year, the service to commence on the second day after that on which the contract is made, is a contract not to be performed within a year within the meaning of the Statute of Frauds, s. 4.—*Cawthorne* v. *Cordrey* (13 C. B. (N.S.) 406; 32 L. J. (C.P.) 152) distinguished.—A contract, which is not enforceable by reason of the provisions of the Statute of Frauds, s. 4, nevertheless is an existing contract and is not void altogether, and a fresh contract cannot be implied from acts done in pursuance of it.—The doctrine as to part performance, whereby a contract not enforceable by an action at law, owing to the provisions of the Statute of Frauds, s. 4, was rendered enforceable in equity, was confined to suits as to the sale of interests in land, and its operation has not been extended by the provisions of the Supreme Court of Judicature Act, 1873. Britain *v.* Rossiter - - - **C. A. 123**

GUARDIAN AD LITEM — Interrogatories — Answer - - - - **251**
See Practice. 8.

HARBOUR—Removal of wreck - - **496**
See Wreck.

HIGHWAY—*Highway Act*, 1862 (25 & 26 *Vict. c.* 61), *ss.* 9 *and* 39—*Dissolution of Highway District—Highway Board existing after such Dissolution.*] By the dissolution of a highway district, in respect of which a highway board had been constituted under the Highway Act, 1862, the highway board, though it ceases to have any control over the highways in its district, does not cease to exist as a corporate body for the performance of its other duties, such as those of suing or being sued, and of acting generally for the purpose of winding up its affairs. The Queen *v.* Justices of Essex - - - - **C. A. 704**

HIGHWAY—*continued.*

2. —— *Meeting for Elections of Waywardens —Several Elections—Demand of Poll—Time for—Mandamus.*] At a vestry meeting held to elect waywardens for eleven townships, different candidates were successively and separately nominated, proposed, and seconded, and, after show of hands, declared by the chairman to be duly elected waywardens for each township. After waywardens had been thus elected for all the townships, an elector demanded a poll in respect of the sixth and seventh townships in order of election. The chairman ruled that the demand was too late, and refused a poll.—On a rule for a mandamus to the defendants to reassemble the meeting, and proceed to an election of waywardens for the two townships:—*Held*, that the proceeding in respect of each township was a separate election, and that the demand for a poll was too late, as it should, in each case, have been made upon the declaration of the show of hands. THE QUEEN *v.* THOMAS [282

—— Surveyor—Local Government Acts—Period of limitation - - - 286
See LOCAL GOVERNMENT ACTS. 3.

HUSBAND AND WIFE—*Married Woman—Restraint on Anticipation—Attachment of Debts—Order XLV., r.* 1.] Judgment having been signed in an action against the defendants, a man and his wife, it was sought to attach in execution moneys, in the hands of trustees forming part of the income of trust funds payable to the wife to her separate use, which had accrued since the judgment. The will by which the trust was created contained a clause restraining anticipation by the wife. It appeared that the action was for the amount of a promissory note made by the husband and wife jointly during the coverture:—*Held*, that the moneys in question could not be attached in execution. CHAPMAN *v.* BIGGS - - 27

ILLEGALITY—Loan society - - 563
See COMPANY.

INFORMATION—Newspaper libel—Fiat of Director of Public Prosecutions - - 750
See CRIMINAL LAW. 2.

INJUNCTION—Restraining party from proceeding with arbitration - - - 30
See ARBITRATION.

INN—License for sale of excisable liquors—Neglect to apply for renewal - 638
See LICENSING ACTS.

INSPECTION OF DOCUMENTS—Title-deeds 370
See PRACTICE. 7.

INSURANCE (FIRE)—*Contract of Indemnity—Vendor and Purchaser—Insurance by Vendor—Fire after Contract for Sale, but before Completion—Right to Insurance Moneys—Subrogation.*] According to the doctrine of subrogation, as between the insurer and the assured, the insurer is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been, exercised, or has accrued, and whether such right could or could not be enforced by the insurer in

INSURANCE (FIRE)—*continued.*

the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be or has been diminished.—A vendor contracted with a purchaser for the sale, at a specified sum, of a house, which had been insured by the vendor with an insurance company against fire. The contract contained no reference to the insurance. After the date of the contract, but before the date fixed for completion, the house was damaged by fire, and the vendor received the insurance-money from the company. The purchase was afterwards completed, and the purchase-money agreed upon, without any abatement on account of the damage by fire, was paid to the vendor:—*Held*, in an action by the company against the vendor, that the company were entitled to recover a sum equal to the insurance-money from the vendor for their own benefit.—Judgment of Chitty, J. (8 Q. B. D. 613), reversed. CASTELLAIN *v.* PRESTON [C. A. 380

INSURANCE (MARINE)—*General Average—Expenses of warehousing and reshipping Cargo, and of Ship leaving Port of Refuge.*] Whether a ship enters a port of refuge in consequence of an injury which is the subject of general average, or in consequence of an injury which is the subject of particular average, the decision in *Atwood* v. *Sellar* (5 Q. B. D. 286) applies, and the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges on the vessel leaving the port, are the subject of general average. SVENSDEN *v.* WALLACE - 616

INTERROGATORIES — Guardian ad litem — Answer - - - - 251
See PRACTICE. 8.

JUDGMENT RECOVERED—*Res Judicata—Separate Actions in respect of same wrongful act—Injury to Property and Person—Damages recoverable in previous Action.*] The plaintiff brought an action in the county court for damage to his cab through the defendant's negligence, and having recovered the amount claimed, brought an action in the Divisional Court against the defendant, claiming damages for personal injury sustained by the plaintiff through the same negligence:—*Held*, that, inasmuch as the damages for personal injuries might have been claimed in the first action, the judgment recovered in it was a bar to subsequent proceedings. BRUNSDEN *v.* HUMPHREY - - - - - 712

JUDGMENT—Amendment—Action against partners in name of firm - - 435
See PRACTICE.

LANDLORD AND TENANT—*Illegal Distress—Withdrawal—Lodgers' Goods Protection Act*, 1871 (34 & 35 *Vict. c.* 79)—*Sufficiency of Declaration and Inventory under s.* 1.] On the 1st of September, 1882, W. distrained for 8*l.* rent due to him from T. who held three rooms under him at the weekly rent of 10*s.* T. had underlet one of the rooms at the weekly rent of 3*s.* 6*d.* (none of which was in arrear) to the plaintiff, who claimed the goods seized as being her sole property, and on the 5th gave W. the proper notice with a

LANDLORD AND TENANT—*continued.*
written declaration and inventory in the form required by s. 1 of the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79). W., in consequence of this claim and of his immediate tenant T. paying him 1*l.* on account of the rent, and engaging to pay the remaining 7*l.* by weekly instalments of 10*s.*, withdrew the distress.—On the 21st of September two more weeks' rent having become due from T., and he having failed to pay any of the instalments as agreed, W. again distrained the same goods for 8*l.*, being 7*l.* of the rent for which the first distress was put in and 1*l.* for the two weeks' subsequently accruing rent. No fresh declaration and inventory having been served upon him by the plaintiff, W. caused the goods to be carried away and sold. At the sale they realized 5*l.* 11*s.*—In an action at the suit of the lodger for wrongfully breaking and entering the premises and converting and selling her goods:—*Held*, first, that as between the defendant and his immediate tenant, the distress on the 21st of September was not wrongful or illegal, but at the most *excessive*, and therefore not the subject of an action in the absence of an allegation and proof of special damage; secondly, that the declaration and inventory served on the 5th of September were not applicable to the distress levied on the 21st, and consequently that the plaintiff could not avail herself of the benefit of the Lodgers' Goods Protection Act, 1871. Thwaites *v.* Wilding - - - 421

2. —— *Distress — Mortgage — Attornment by Mortgagor—Seizure of Goods of Stranger.*] If a mortgage is created by way of demise for a term of years, and the mortgagor attorns and becomes tenant to the mortgagee at a certain rent, the relation of landlord and tenant is created, and upon failure to pay the rent the mortgagee is entitled to distrain the goods even of a stranger. J., being lessee for a term of years, demised to P., by way of mortgage, all his interest in the term save one day, and J. attorned and became tenant to P. at a certain rent. J., being mortgagor, let the mortgaged premises to K., who assigned his goods thereon to R. The rent due from J. to P. being unpaid, P. distrained the goods assigned by K. to R. No rent was then due from K.—R. having brought an action against P. for the seizure of the goods:—*Held*, that by the attornment J. had become tenant to P., and that the distress was lawful. Kearsley *v.* Philips C. A. 621

3. —— *Distress — Fraudulent Removal of Goods—Termination of Tenancy—Possession of Tenant*—8 *Anne*, *c.* 14, *ss.* 6, 7—11 *Geo.* 2, *c.* 19, *s.* 1.] A landlord cannot follow and distrain his tenant's goods which have been fraudulently removed to prevent a distress for rent due, if at the time of the distress the tenant's interest in the demised premises has come to an end and he is no longer in possession.—The plaintiff was tenant to the defendant of a house. The defendant having terminated the tenancy, the plaintiff removed his goods on the day of its termination, and on the same day gave up possession of the house to the defendant. One quarter's rent was due on the day when the tenancy terminated, and as that remained unpaid, within thirty days of the removal the defendant followed the plaintiff's goods to the place of removal, and there distrained them. An action having been brought for wrongful distress, the jury found that the goods had been fraudulently removed in order to prevent a distress:—*Held*, that, notwithstanding the finding of the jury, the plaintiff was entitled to judgment. Gray *v.* Stait - - - C. A. 668

—— Disclaimer of lease—Assignment to pauper *See* Bankruptcy. 3. [92

—— Distress—Crops—Bill of sale—Surrender—Expenses of cultivation - - 808
See Bill of Sale.

LANDS CLAUSES ACTS—*Lands Clauses Consolidation Act*, 1845 (8 *Vict. c.* 18), *ss.* 33, 24—*Settlement of Purchase-money by Arbitration—Costs of Arbitration — Payment due before Conveyance.*] Where the amount of compensation payable to the owner of land compulsorily taken under the Lands Clauses Act, 1845, is settled by arbitration, and the amount and the costs of the arbitration are awarded to the owner, such costs become payable to him within a reasonable time afterwards, and the execution of the conveyance by him of the lands taken is not a condition precedent to the payment of such costs. Capell *v.* Great Western Railway Co. - - - - C. A. 345

LARCENY—Water stored in pipes - - 21
See Criminal Law. 3.

LEGACY DUTY—Valuation of property by executor - - - - 16
See Revenue. 2.

LIBEL—Privilege—Publication by mistake 43
See Defamation.

—— Privilege—Advocate - - - 588
See Defamation. 2.

—— Remoteness of damage - - - 407
See Defamation. 3.

—— Innuendo—Criminal offence - - 609
See Defamation. 4.

LICENSING ACTS—*Ale House—License for Sale of Excisable Liquors—Neglect of Occupier about to Remove to apply for Renewal—Expiration of Licence—Application to Special Sessions*—9 *Geo. IV.*, *c.* 61, *s.* 14.] S., tenant of a house and licensed to sell excisable liquors therein, made over the house in June, 1881, to W., who forthwith sub-let it to B. B. applied at a special sessions for a transfer of the licence, which was opposed by S., and refused. At the time of the general licensing meeting B. was in occupation, but was about to leave owing to illness in her family, and did not apply for a renewal of the licence. She left shortly afterwards and the house was shut up, and no excisable liquors had been sold there since June. In September, after the close of the licensing meeting, the landlord learnt that the house was vacant and took possession. The licence expired on the 10th of October. The landlord afterwards let to D., who, in January, 1882, applied to a special sessions for a renewal of the licence:—*Held*, that B. as occupier, though not holding a licence, was a person entitled to apply at the general sessions for a renewal of the licence, and that the event mentioned in 9 Geo. IV., c. 61, s. 14, of the occupier of a house being about to

LICENSING ACTS—*continued.*
quit the same neglecting to apply at the general meeting for a licence to continue to sell excisable liquors therein, had occurred, so that an application under that section could be made:—*Held*, also, overruling *Ex parte Todd* (3 Q. B. D. 407), and *White* v. *Justices of Coquetdale* (7 Q. B. D. 238), that it was not necessary that the application should be made before the expiration of the period for which the old licence was in force, and that the justices in special sessions had jurisdiction to grant the application. THE QUEEN *v.* LAWRENCE [C. A. 638

2. —— *Conviction of licensed Person—Forfeiture of Licence—Application by Owner of Premises to Special Sessions for License, Refusal of—Right of Appeal to Quarter Sessions—9 Geo. 4, c. 61, ss. 4, 14; 35 & 36 Vict. c. 94, s. 9; 37 & 38 Vict. c. 49, s. 15.*] The appeal clauses of 9 Geo. 4, c. 61 (the Intoxicating Liquors Licensing Act, 1828), are incorporated in 37 & 38 Vict. c. 49 (the Licensing Act, 1874), s. 15, and therefore when the licence of a public-house keeper is forfeited by conviction under 35 & 36 Vict. c. 94, s. 9, and the owner of the premises duly applies under 37 & 38 Vict. c. 49, s. 15, to special sessions for a licence and it is refused, he has a right of appeal to quarter sessions. THE QUEEN *v.* JUSTICES OF WEST RIDING - - - - C. A. 417

3. —— *Beer Dealers' Retail Licenses Act*, 1882 (45 & 46 *Vict. c.* 34), *s.* 1—"*Off*" *Licenses—Renewal—Appeal.*] The right of appeal to quarter sessions, from a refusal of licensing justices to renew a certificate for a licence to sell beer not to be consumed on the premises, has not been taken away by the Beer Dealers' Retail Licenses Act, 1882 (45 & 46 Vict. c. 34), s. 1. THE QUEEN *v.* SCHNEIDER - - - - - 66

4. —— *Sunday Closing* (*Wales*) *Act*, 1881 (44 & 45 *Vict.*) *c.* 61—"*Christmas Day and Good Friday.*"] By s. 3 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), "all premises in which intoxicating liquors are sold by retail, wherever situate, shall be closed on Christmas Day and Good Friday, as if Christmas Day and Good Friday were respectively Sunday."—By s. 1 of the Sunday Closing (Wales) Act, 1881 (44 & 45 Vict. c. 61), all such premises are to be closed "during the whole of Sunday":—*Held*, that the word "Sunday" in the Welsh Act only has its ordinary meaning, and that a conviction under that Act for unlawfully keeping open premises for the sale of intoxicating liquors on Christmas Day was bad. FORSDIKE *v.* COLQUHOUN - 71

LIMITATIONS, STATUTE OF—*Conversion—Demand and Refusal—Title Deeds.*] Title deeds of the plaintiffs were fraudulently taken from them and deposited by a third person, without their knowledge, with the defendant in 1859, who held them without knowledge of the fraud to secure the repayment of a loan. The plaintiffs on discovering the loss of the deeds in 1882, demanded them of the defendant and upon his refusal to give them up brought an action to recover them, to which the defendant pleaded the Statute of Limitations:—*Held*, that until demand and refusal to give up the deeds to the real owners they had no right of action against which the statute would run. SPACKMAN *v.* FOSTER - - - 99

LIMITATION OF ACTION—Surveyor of highway—Urban authority - - - 286
See LOCAL GOVERNMENT ACTS. 3.

LOAN SOCIETY—Illegality - - - 563
See COMPANY.

LOCAL GOVERNMENT ACTS—*Compensation—Procedure—Time for determining Liability and Compensation—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 179, 180, 308.] The defendants by altering a roadway under the powers of the Public Health Act, 1875, injured the access to the plaintiff's house. He thereupon claimed compensation from the defendants, and appointed an arbitrator. The defendants did not appoint an arbitrator, and thereupon the arbitrator appointed by the plaintiff awarded to him a certain sum as compensation for the injury done to his house. The defendants not having paid this amount, an action was brought to recover it, in which the liability of the defendants to compensate the plaintiff was established; but the defendants objected that the action would not lie, on the ground that the question of liability ought to have been decided before the amount of compensation was ascertained:—*Held*, that the action was maintainable, and that the plaintiff was entitled to judgment. PEARSALL *v.* BRIERLEY HILL LOCAL BOARD - - - - C. A. 735

2. —— *Justice of the Peace—Summary Proceedings—Jurisdiction—Public Health—Expenses of sewering Street—The Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.] Upon the hearing of a complaint preferred before a police magistrate by the urban authority of the district, acting under s. 150 of the Public Health Act, 1875, to recover the amount apportioned upon a frontager in respect of expenses incurred by the urban authority in sewering, &c., a street, the frontager objected that the plans referred to in the notice requiring him to execute the work shewed that part of the work, in respect of which upon his failure to comply with the notice the expenses were incurred, was executed upon land belonging to private owners. The magistrate found as a fact that the land did not belong to private owners, but formed part of the street when the notice was given, and made an order for payment of the amount apportioned. Upon an application for a writ of certiorari upon affidavits which satisfied the Court that the magistrates' finding was contrary to the fact:—*Held*, that the magistrate nevertheless had jurisdiction to entertain the complaint and make the order, and therefore that the frontager was not entitled to a writ of certiorari:—*Semble*, per Cave, J., that the applicant's proper remedy was to appeal to the Local Government Board, under s. 268 of the Public Health Act, 1875, against the notice of demand for payment of the apportioned sum given by the urban authority, and not to appeal against the magistrate's order to quarter sessions. EX PARTE WAKE - - - - - 291

3. —— *Highway—Limitation of Action—Urban Authority—Surveyors of Highways constituted by Local Act—5 & 6 Will. 4, c. 50, s. 109—5 & 6 Vict. c. 97, s. 5—Public Heath Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 144, 264, 341.] By a local Act passed in 1862, the corporation of Salford were constituted surveyors of highways

LOCAL GOVERNMENT ACTS—*continued.*

within the borough, having and being subject to all such powers and liabilities as any surveyors of highways had or were subject to by virtue of the law for the time being in force. Sect. 109 of 5 & 6 Wm. 4, c. 50 (the Highway Act of 1835), limits the period within which any action may be brought for anything done under the authority of that Act to three months after the fact committed for which the action is brought. Sect. 5 of 5 & 6 Vict. c. 97, limits the period within which any action may be brought for anything done under the authority of the local Acts to two years after the cause of action. By the Public Health Act, 1875, s. 144, urban authorities (including by s. 6 corporations of boroughs), are constituted surveyors of highways within their district, having and being subject to all the powers, duties, and liabilities (so far as the same are not inconsistent with the provisions of that Act) of surveyors of highways under the law for the time being in force. Sect. 264 limits the period within which actions may be brought for anything done under that Act to six months after the cause of action accrued; and by s. 341, all powers given by that Act shall be deemed to be in addition to and not in derogation of any other powers conferred by statute, and such other powers may be exercised in the same manner as if that Act had not passed.—In an action against the corporation for negligence, as surveyors of highways, commenced more than three but less than six months after the cause of action accrued:—*Held*, that the defendants were entitled to rely on the limitation of three months provided by 5 & 6 Wm. 4, c. 50, and therefore that the action could not be maintained.—*Taylor* v. *Meltham Local Board* (47 L. J. (C.P.) 12) distinguished. BURTON *v.* CORPORATION OF SALFORD - - - - - 286

4. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 264—*Notice of Action—Action for Recovery of Land.*] Sect. 264 of the Public Health Act, 1875 (38 & 39 Vict. c. 55),—which enacts that no writ or process shall be sued out against any local authority for anything done or intended to be done under the provisions of the Act until one month after written notice of action, &c., and that any person to whom any such notice of action is given, may tender amends to the plaintiff within one month after the service of such notice—does not apply to an action for the recovery of land. FOAT *v.* THE MAYOR, &C., OF MARGATE - - - - - 299

5. —— *Notice of Action—Action brought after Time limited by Statute—Money paid under Mistake of Fact—Money received for Plaintiff's use—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55). *s.* 264.] The defendants, under the Public Health Act, 1875, s. 150, gave notice to the plaintiffs, as adjoining owners, to pave a part of a road situate within the defendants' district. It was then believed by both the plaintiffs and the defendants that the road was not repairable by the inhabitants at large. The plaintiffs not having done the work, the defendants did it and charged the cost to the plaintiffs, who paid it. It was afterwards discovered that the road was repairable by the inhabitants at large, and therefore that the plaintiffs were not liable, as adjoining

LOCAL GOVERNMENT ACTS—*continued.*

owners, to pave the road. The plaintiffs thereupon demanded back from the defendants the money paid by them as the cost of paving the part of the road; but the defendants refused to return it. The plaintiffs, thereupon, sued to recover it as money paid under a mistake of fact and as money received to their use; but the plaintiffs did not give the defendants notice of action, and the action was commenced more than six months after the cost of paving the part of the road had been paid to the defendants:—*Held*, that notice of action was necessary, and that the action was brought too late, and that the provisions of the Public Health Act, 1875, s. 264, applied.—*Waterhouse* v. *Keen* (4 B. & C. 200), and *Selmes* v. *Judge* (Law Rep. 6 Q. B. 724), followed. MIDLAND RAILWAY CO. *v.* WITHINGTON LOCAL BOARD - - - - C. A. 788

6. —— *Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 94–96—*Nuisance, Power of Justices to order Specific Works for Abatement of.*] A water-closet in the centre of a house being a nuisance, the sanitary authority gave notice to the owner of the house under the 94th section of the Public Health Act, 1875, to abate the nuisance, and for that purpose to remove the said closet from the centre of the house and place the same near an outer wall where there might be efficient ventilation, and to fix the soil-pipe outside the walls. The owner making default in so doing, justices thereupon, under s. 96, ordered him to do the things above specified:—*Held*, that they had jurisdiction under the 96th section to make the order.—*Ex parte Whitchurch* (6 Q. B. D. 545) distinguished. EX PARTE SAUNDERS - 191

LOTTERY—*Sale of Packets of Tea containing Coupons for Prizes—42 Geo. 3, c. 119, s. 2.*] By 42 Geo. 3, c. 119, s. 2, it is made an offence to keep any office or place to exercise any lottery not authorized by parliament.—The appellant erected a tent, in which he sold packets, each containing a pound of tea, at 2*s.* 6*d.* a packet. In each packet was a coupon entitling the purchaser to a prize, and this was publicly stated by the appellant before the sale, but the purchasers did not know until after the sale what prizes they were entitled to, and the prizes varied in character and value. The tea was good and worth the money paid for it:—*Held*, that what the appellant did constituted a lottery within the meaning of the statute. TAYLOR *v.* SMETTEN - - 207

LUNATIC—Title-deeds—Inspection—Custody of Court - - - - 370

See PRACTICE. 7.

—— Removal—Separation of husband and wife *See* POOR LAW. [113

MAINTENANCE—*Action for—Common Interest, what amounts to.*] The plaintiff having sat and voted as a member of Parliament without having made and subscribed the oath appointed by the 5th section of 29 & 30 Vict. c. 19, the defendant, who was also a member of Parliament, procured C. to sue the plaintiff for the penalty imposed by that section for contravention thereof. C. was a person of insufficient means to pay the costs in the event of the action being unsuccessful. After the

MAINTENANCE—*continued.*
commencement of the action the defendant gave to C. a bond of indemnity against all costs and expenses he might incur in consequence of the action. It was ultimately decided in the House of Lords that the above mentioned section does not enable a common informer to sue for the penalty, and that therefore the action would not lie. The plaintiff brought an action for maintenance against the defendant:—*Held*, that the defendant and C. had no common interest in the result of the action for the penalty; that the conduct of the defendant in respect of such action amounted to maintenance; and that the action for maintenance was therefore maintainable. BRADLAUGH *v.* NEWDEGATE - - - - 1

MALICIOUS PROSECUTION—*Malicious Presentation of Petition to wind up Trading Company—Reasonable and Probable Cause.*] An action will lie for falsely and maliciously and without reasonable or probable cause presenting a petition under the Companies Acts, 1862, 1867, to wind up a trading company, even although no pecuniary loss or special damage to the company can be proved, for the presentation of the petition is, from its very nature, calculated to injure the credit of the company.—The defendant, who had been a shareholder in the plaintiff company, instructed certain brokers to sell his shares, and signed a transfer. The brokers informed him that they could not sell the shares, but the transfer was not returned to him. After waiting ten or eleven days he presented a petition to wind up the company on the ground of fraud in its formation, and of the impossibility that it could carry on business at a profit. At the time of presenting the petition the company, which was a trading company, had property of a large amount, and its debts were trifling. The defendant was not then in fact a shareholder: his shares had been sold, and the transfer had been registered. Upon discovering that his shares had been sold, he gave notice that the petition would be withdrawn, and it was ultimately dismissed without costs. The company having brought an action for falsely and maliciously and without reasonable or probable cause presenting the petition, at the trial no proof of damage to the company was given beyond the liability to pay its own costs of defending itself against the petition; and upon this ground the company was nonsuited at the close of its case;—*Held*, that although the liability to pay "extra costs" was not a ground of legal damage, nevertheless the nonsuit was wrong, and a new trial must be had, because an action would lie for falsely and maliciously and without reasonable or probable cause presenting the petition to wind up, which was necessarily injurious to the credit of the company:—*Held*, further, that as at the time of presenting the petition the company was an existing and going concern, and had valuable property and was solvent, unless other facts could be shewn, there was a want of reasonable and probable cause for presenting the petition, and the opinion of the jury ought to have been taken whether the defendant had been actuated by malice:—*Held*, further, that if the defendant as a matter of business ought, in the opinion of the jury, to have inferred from the failure of the

MALICIOUS PROSECUTION—*continued.*
brokers to return the transfer, that the shares had been sold, the defendant would have had no reasonable or probable cause to suppose that he was still a shareholder.—*Johnson* v. *Emerson* (Law Rep. 6 Ex. 329) commented upon. QUARTZ HILL GOLD MINING COMPANY *v.* EYRE - **C. A. 674**

2. —— *Reasonable and Probable Cause—Onus of Proof—Direction to Jury.*] In an action for malicious prosecution, where the plaintiff makes out a primâ facie case, and the judge, in order to enable himself to determine the issue of reasonable and probable cause, leaves subsidiary questions of fact to the jury, the onus of proving the existence of such facts as tend to establish reasonable and probable cause lies upon the defendant. ABRATH *v.* NORTH EASTERN RAILWAY CO. - 79

3. —— *Reasonable and Probable Cause—Burden of Proof—Direction to Jury.*] In an action for malicious prosecution the burden of proof as to all the issues arising therein lies upon the plaintiff; and although the plaintiff proves that he was innocent of the charge laid against him, and although the judge in order to enable himself to determine the issue of reasonable and probable cause, leaves subsidiary questions of fact to the jury, nevertheless the onus of proving the existence of such facts as tend to establish the want of reasonable and probable cause on the part of the defendant, rests upon the plaintiff. The plaintiff, a surgeon, had attended one M. for bodily injuries alleged to have been sustained in a collision upon the defendants' railway. M. brought an action against the defendants, which was compromised by the defendants paying a large sum for damages and costs. Subsequently the directors of the defendants' company, having received certain information, caused the statements of certain persons to be taken by a solicitor; these statements tended to shew that the injuries of which M. complained were not caused at the collision, but were produced wilfully by the plaintiff, with the consent of M., for the purpose of defrauding the defendants. These statements were laid before counsel, who advised that there was good ground for prosecuting the plaintiff and M. for conspiracy. The defendants accordingly prosecuted the plaintiff, but he was acquitted. In an action for malicious prosecution, the judge directed the jury to find whether the defendants had taken reasonable care to inform themselves of the true state of the case, and whether they honestly believed the case which they laid before the magistrates; the jury having answered these questions in the affirmative, the judge entered the judgment for the defendants:—*Held*, by the Court of Appeal, reversing the previous case, that the direction to the jury was correct, that upon the facts and the findings of the jury, the defendants had reasonable and probable cause for prosecuting the plaintiff, and that the judge had rightly entered the judgment for the defendants. ABRATH *v.* NORTH EASTERN RAILWAY CO. - - - - - **C. A. 440**

MANDAMUS—*Central Criminal Court—4 & 5 Wm. 4, c. 36.*] Mandamus will not lie to the judges and justices of the Central Criminal Court. —The Recorder of London, upon the trial and conviction of a prisoner charged with larceny,

MANDAMUS—*continued.*
having refused to order (under 24 & 25 Vict. c. 96, s. 100) the person with whom the stolen property was pledged to restore it to the prosecutor,—the Queen's Bench refused to grant a mandamus directed to "the judges and justices of the Central Criminal Court," to compel the Recorder to make such order. The Queen *v.* Justices of Central Criminal Court - - - - - 479

—— Justices—Prison Act, 1877 - - 656
See Prison.

MANOR—Arbitrary fine—Omission to demand exact sum - - - - 574
See Copyhold.

MASTER AND SERVANT—*Negligence—Common Employment—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1 *sub-s.* 5—*Railway Company—Person having "charge or control" of Points.*] In an action for compensation under the Employers' Liability Act, 1880, the evidence shewed that it was the duty of F., a workman employed in the signal department of the defendant's railway, to clean, oil, and adjust the points and wires of the locking apparatus at various places along a portion of the line, and to do slight repairs; that for these purposes he was, with several other men, subject to the orders of an inspector in the same department, who was responsible for the points and locking gear, which were moved and worked by men in the signal boxes, being kept in proper condition; and that F., having taken the cover off some points and locking gear in order to oil them, negligently left it projecting over the metals of the line, whereby injury was caused to a fellow workman:—*Held*, that there was no evidence for the jury that F. had "charge or control" of the points within the meaning of s. 1, sub-s. 5, of the Employers' Liability Act, 1880, so as to make the defendants liable for his negligence. Gibbs *v.* Great Western Railway Co. - - 22

2. —— *Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1—*Negligence whilst in the exercise of Superintendence—Superintendent assisting in Manual Labour.*] An employer may be liable under the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 1, where personal injury is caused to a workman (sub-s. 2), "by reason of the negligence of any person in the service of the employer who has any superintendence entrusted to him whilst in the exercise of such superintendence," although the superintendent, when negligent, is voluntarily assisting in manual labour. Osborne *v.* Jackson - - - - - - - 619

MAYOR'S COURT—*Practice—Execution issued from High Court upon Judgment of Mayor's Court—Mayor's Court of London Procedure Act*, 1857 (20 & 21 *Vict. c. clvii.*), *s.* 48—*Borough and Local Courts of Record Act*, 1872 (35 & 36 *Vict. c.* 86), *s.* 6—*Statute, Construction of—Repeal by Implication—Permissive Words.*] By the Mayor's Court of London Procedure Act, 1857, s. 48, execution might be issued in a superior Court upon a judgment obtained in the Mayor's Court. By the Borough and Local Courts of Record Act, 1872, s. 6, where final judgment has been obtained in any local court for a sum not exceeding 20*l.*, "such court shall be at liberty to send a writ or precept for the recovery of the same to the registrar of any county court within the jurisdiction of which the defendant may possess any goods or chattels . . . . and thereupon the high bailiff of such county court shall execute the same in the same manner as if such writ or precept had been issued out of such county court":—*Held*, that the two statutes were not inconsistent, and that the Mayor's Court of London Procedure Act, 1857, s. 48, had not been repealed by the Borough and Local Courts of Record Act, 1872, s. 6; and that notwithstanding the latter statute execution might be issued in the High Court of Justice upon a judgment for a sum not exceeding 20*l.* obtained in the Mayor's Court. Paine *v.* Slater - - C. A. 120

METROPOLIS MANAGEMENT ACTS—18 & 19 *Vict. c.* 120, *ss.* 54, 60—*Vestry—Member interested in Contract—Acting as Member—Penalty—Evidence—Minute-book.*] The brother of the defendant entered into a contract with a vestry constituted under the Metropolis Management Act, 1855, and in order to enable him to carry it out, borrowed money from the defendant, who by way of security took an assignment of the contract. Afterwards the defendant was elected a member of the vestry. An action for penalties having been brought against the defendant for acting as member of the vestry, an attendance-book of the members signed by the defendant and the minute-book of the vestry containing his name as a member in attendance were put in as evidence at the trial:—*Held*, that s. 54 of the Metropolis Management Act, 1855, applied to contracts made as well before as after the election of a member, and that the defendant was "interested" in the contract in question within the meaning of that section; that there was evidence under s. 60 that the defendant had acted as member of the vestry; and that he was liable to penalties for having acted after he had "ceased" to be a member. Hunnings *v.* Williamson [C. A. 533

MINE—Right of support to surface—Railway Company - - - - 820
See Railway. 2.

MISTAKE—Fact—Money had and received—Notice of action - - - 783
See Local Government Acts. 5.

MONEY HAD AND RECEIVED—Local Government Acts—Notice of action - 788
See Local Government Acts. 5.

—— Extortion—Payment under protest - 275
See Distress.

—— Worthless bank note - - - 84
See Bank of England.

MORTGAGE—Attornment by mortgagor—Distress—Goods of stranger - - 621
See Landlord and Tenant. 2.

MUSIC—Copyright—Dramatic Piece - 102
See Copyright.

NEGLIGENCE—*Breach of Duty—Defective Article supplied for Use—Liability of Person supplying a Defective Article causing Injury to the Person who used it.*] The defendant, a dock owner,

NEGLIGENCE—*continued.*

supplied and put up a staging outside a ship in his dock under a contract with the shipowner. The plaintiff was a workman in the employ of a ship painter who had contracted with the shipowner to paint the outside of the ship, and in order to do the painting the plaintiff went on and used the staging, when one of the ropes by which it was slung, being unfit for use when supplied by the defendant, broke, and by reason thereof the plaintiff fell into the dock and was injured:—*Held*, reversing the decision of the Queen's Bench Division, that the plaintiff, being engaged on work on the vessel in the performance of which the defendant, as dock owner, was interested, the defendant was under an obligation to him to take reasonable care that at the time he supplied the staging and ropes they were in a fit state to be used, and that for the neglect of such duty the defendant was liable to the plaintiff for the injury he had sustained:—*Held*, also, by Brett, M.R., that whenever one person is by circumstances placed in such a position with regard to another, that every one of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger. HEAVEN *v.* PENDER [C. A. 503

2. —— *Contributory Negligence — Licensee.*] The deceased was employed by a builder to watch and protect certain unfinished buildings. Workmen were employed by the defendant, a contractor, on the land near to where the deceased was on duty, to excavate the earth for the foundations of other buildings. In the performance of this operation they employed a steam-crane and winch to which were attached a chain and iron bucket by means of which the earth was raised from the excavation and thence to the carts which were to carry it away. The deceased had nothing to do with the excavations, but was standing where he need not have been, watching the defendant's men at work, and allowing the bucket to pass some three feet over his head, when the chain broke and the bucket and its contents falling upon him so injured him that he subsequently died:—*Held*, that there was no evidence of negligence in the defendant's workmen; that the deceased was at the most a bare licensee; and that he stood where he did subject to all the risks incident to the position in which he had placed himself. BATCHELOR *v.* FORTESCUE - C. A. 474

3. —— *Railway Company—Level Crossing—Accident caused by Plaintiff's own Negligence.*] The defendants' railway crossed a public footway on the level. About half-past four o'clock in the afternoon on the 29th of March the plaintiff, a foot passenger, while crossing from the down side to the up side of the railway, was knocked down and injured at the crossing by a train of the defendants on the up line. Owing to the position of certain buildings which stood by the line it was impossible for any one crossing from the down side to see a train coming until he got within a step or two from the down line, but a person standing on the down line or the six foot had a clear and uninterrupted view up and down the line for several hundred yards. The plaintiff stated that before crossing he looked to the right along the down line, but he admitted that he did not look to the left along the up line, and that if he had looked he must have seen the train coming. The engine driver did not whistle. There was a servant of the company employed as a gate-keeper at the crossing standing near the crossing, but he gave no warning to the plaintiff that a train was coming. The plaintiff, having brought an action against the company to recover compensation for his injuries, was nonsuited on the above facts being proved at the trial:—*Held*, by Lord Coleridge, C.J., and Denman, J. (Manisty, J., not assenting), that the nonsuit was right, on the ground that the undisputed facts of the case shewed that there was no negligence on the part of the defendants, and that the plaintiff's own want of caution was the sole cause of the accident. DAVEY *v.* LONDON AND SOUTH WESTERN RAILWAY CO. - 213

—— Delivery order—Estoppel - - 776
See ESTOPPEL.

—— Employers' Liability Act, 1880—Superintendent assisting in manual labour - 619
See MASTER AND SERVANT. 2.

—— Railway company—"Charge or control" of points - - - - 22
See MASTER AND SERVANT.

NOTICE OF ACTION—Local Government Acts—Money paid - - - - 788
See LOCAL GOVERNMENT ACTS. 5.

—— Local Government Acts—Action for recovery of land - - - - 299
See LOCAL GOVERNMENT ACTS. 4.

NUISANCE—Abatement—Sanitary authority
See LOCAL GOVERNMENT ACTS. [191

OFFICIAL REFEREE—Application to set aside findings—Time - - - 180
See PRACTICE. 11.

OVERSEERS—Parish—Opposition to bill in Parliament—Costs - - - 309
See POOR LAW. 3.

PARTNER—Action against partners in name of firm—Amendment of judgment - 435
See PRACTICE.

—— Breach of trust—Bankruptcy—Liability of co-partner - - - - 351
See BANKRUPTCY. 2.

PHOTOGRAPH—"Author"—Copyright - 627
See COPYRIGHT. 2.

POOR-LAW—*Lunatic Wife—Removal of—Consent of Husband—25 & Vict. c. 111, s. 20—Separation of Husband and Wife.*] A wife having become insane and chargeable to the union in which her husband dwelt, was taken from his house to the workhouse of the union, and the medical officer thereof certified, under 25 & 26 Vict. c. 111, s. 20, that the lunatic was a proper person to be kept in a workhouse. An order was then made by justices for her removal alone to another union containing her husband's last place of settlement. The husband consented to the removal order; the wife was mentally incapable of

POOR LAW—*continued.*

consent:—*Held*, that the order of removal made under these circumstances did not contravene the policy of the law with regard to the separation of husband and wife, and was good. The Queen *v.* Guardians of Preston - - - 113

2. —— *Removal of Pauper Wife and Children—Settlement—Derivative Birth—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.] An order for the removal of a pauper wife and her three children, aged respectively five years, three years, and one year, on the ground that the settlement of her husband was the birth settlement of his father within the union to which the removal was made, having been made and appealed against, the birth settlement of the husband's father in such union was proved, but no other settlement either of the husband or of his father being set up, the order was quashed by an order of the Court of quarter sessions and the Queen's Bench Division confirmed such order of the sessions:—*Held*, affirming the decision of the Queen's Bench Division, that evidence of the settlement of the husband's father was inadmissible, and could not be acted upon in making the order of removal, as it went to prove the derivative settlement of the parent of the children contrary to s. 35 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61), and that consequently the order of removal was rightly quashed. The Queen *v.* Guardians of Bridgnorth [C. A. 314

3. —— *Overseers of Parish—Bill in Parliament affecting Parish—Opposition by Overseers—Costs of Opposition.*] A bill before Parliament provided for the punctual payment of interest on the share capital of the undertaking, for which authority was sought by declaring that the overseers of the parish in which such undertaking was situated should, when required so to do, raise as part of the poor-rate money for the payment of such interest. The overseers opposed the bill, which was rejected by a committee of the House of Lords. On an application for a writ of certiorari to bring up and quash the certificate of the district auditor allowing the taxed costs of such opposition:—*Held*, that there was no duty on the part of the overseers to oppose the bill, and that they were not entitled to charge the costs of the opposition on the poor-rate. The Queen *v.* White - 309

POOR-RATE—*Residence of Police Officer—Residence when not part of the Police Station—Rateability—Building for purposes.*] A superintendent of the police for a county police division had as his quarters a house, which was rented for him by the county authorities, and which he furnished; his rent was paid out of the police rates, and the amount deducted from his salary as superintendent. The house was liable to be examined and its fitness reported by one of Her Majesty's inspectors, and to be used for purposes connected with the police force as the chief constable might direct, but no room in it was specially set apart for any other purpose than for the use of the superintendent and his family. The house was a quarter of a mile from the police station, within a convenient distance of which it was necessary that the superintendent should reside for the performance of his duties; and he was compelled to live in it as long as it was rented for him by the county authorities, but he was liable to be removed from it at any time, and from one police division to another:—*Held*, that such superintendent was rateable to the poor rate in respect of such house, as his occupation was a beneficial one, and the house, being no part of the police-station, did not come within the recognised heads of property which is treated as Crown property.—The case of *Gambier* v. *Overseers of Lydford* (3 E. & B. 346; 23 L. J. (M.C.) 69) approved. Martin *v.* West Derby Assessment Committee - - - C. A. 145

2. —— *Valuation (Metropolis) Act*, 1869 (32 & 33 *Vict. c.* 67), *ss.* 46, 47—*Supplemental Valuation List, Omission from—Alterations during preceding twelve months—Diminution of Income—Evidence.*] In an appeal against a supplemental valuation list under the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), whether that appeal be under s. 46, or s. 47, evidence is admissible only of an alteration in value occurring during the twelve months preceding the making of such list, and it is not competent to the appellant to open up the previous quinquennial or supplemental list by giving evidence of alterations antecedent to the period of twelve months before the making of the list appealed against.—Evidence of a diminution of income in the twelve months preceding the making of the supplemental list, though both admissible and relevant, is not sufficient to shew an alteration in value during that period within the meaning of ss. 46, 47. The Queen *v.* East and West India Dock Co. - - - 721

POUND—Distress damage feasant—Tender of damages—Action for money had and received - - - - 275
See Distress.

PRACTICE—*Action against Partners in Name of Firm—Appearance by one Partner only—Judgment entered against Partner appearing instead of against Firm—Application to issue Execution against other Partner—Amendment of Judgment—Order XII., r.* 12; *Order XLII., r.* 8.] The plaintiff issued a writ against the firm of R. & Co. R. only appeared to the writ, and the plaintiff delivered statement of claim against "R. sued as R. & Co.". Issue having been joined, the case proceeded to trial, when a verdict for the plaintiff was taken by consent, and judgment signed against "R. sued as R. & Co." The plaintiff having subsequently discovered that C. had been a member of the firm of R. & Co., applied for an order to amend the judgment by making it, in accordance with the writ, a judgment against the firm of R. & Co.:—*Held*, that the amendment ought not to be allowed, for the plaintiff, although he acted in ignorance of the facts, must be taken to have elected to sue R. alone, and was concluded by the form of the proceedings subsequent to the appearance.—Judgment of the Queen's Bench Division (10 Q. B. D. 475) reversed. Munster *v.* Railton [C. A. 435

2. —— *Admission on Pleadings—Claim, Admission of—Counter-claim—Rules of Supreme Court*, 1875, *Order XIX., r.* 3; *Order XL., r.* 11.] In an action for a liquidated demand the defendants pleaded admitting the claim, but setting up a counter-claim for unliquidated damages to a greater amount.—The Court refused an applica-

PRACTICE—*continued.*

tion under Order XL., rule 11, for an order to sign judgment for the plaintiffs upon the claim, and for payment of the amount thereof by the defendants into court to abide the result of the action.—Judgment of the Queen's Bench Division (10 Q. B. D. 468) affirmed. MERSEY STEAMSHIP Co. *v.* SHUTTLEWORTH - - - **C. A. 531**

3. —— *Attachment of Debts — Income from Trust Fund—"Debt owing or accruing"—Order XLV., r. 2.*] A judgment debtor was entitled for his life to the income arising from a fund vested in trustees, payable half-yearly in February and August. Upon application by the judgment creditor in November for a garnishee order attaching the debtor's share of the income in the hands of the trustees, it appeared that the last half-yearly payment had been made, and that there was no money the proceeds of the trust property in the hands of the trustees:—*Held*, affirming the decision of the Queen's Bench Division, that there was no debt "owing or accruing" at the time when the order was applied for which could be attached under Order XLV., rule 2.—*Semble*, that the proper course for the judgment creditor to pursue was to apply for the appointment of a receiver, under the practice of the Chancery Division. WEBB *v.* STENTON **C. A. 518**

4. —— *Contempt of Court—Attachment—Privilege—Police Court—Solicitor—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *sub-s.* 4—*Debtors Act*, 1878 (41 & 42 *Vict. c.* 54), *s.* 1.] Disobedience by a solicitor to an order of Court made against him as an officer of the Court is a contempt of a criminal nature, and an attachment granted to enforce compliance with the order of Court is process of a punitive and disciplinary character; and therefore no privilege from arrest exists or can be claimed against the execution of the attachment. —Privilege from arrest for contempt of Court, where it otherwise exists, can be claimed in respect of attendance as an advocate at a police court as well as at any other Court, although the proceedings at the police court consist merely of a preliminary inquiry on a charge of felony.—F. was a solicitor, and an order was made at chambers that he should deliver up certain documents and should pay the sum of 10*l.* and certain costs. This order was made against F. as an officer of the Court. F. delivered up the documents, but he did not pay the sum of 10*l.* or the costs. An order for the attachment of F. for contempt of Court was thereupon made at chambers. F. then paid the sum of 10*l.*, but he did not pay the costs. He was arrested under the attachment, whilst he was on his return to his offices from a metropolitan police court, where he had been as advocate attending to defend certain persons at a preliminary inquiry on a charge of treason-felony:—*Held*, that he was not entitled to be discharged from custody on the ground of privilege from arrest, the attachment having been granted for a contempt of a criminal nature. IN RE W. A. FRESTON - - - - - **C. A. 545**

5. —— *Costs—Order on Solicitor personally to pay—Appeal—Judicature Act*, 1873, *s.* 49.] An order that the costs of an application at chambers on behalf of a client shall be paid by his solicitor personally is within the Judicature Act, 1873, s. 49, and therefore not subject to any appeal, except by leave. IN RE BRADFORD - **373**

6. —— *Production of Documents—Affidavit of Documents—Application for further Affidavit—"Material to any Matter in Question in the Action"—Rules of Supreme Court*, 1875, *Order XXXI., r.* 12.] Documents are material to the matters in question in the action within the meaning of Order XXXI., rule 12, if it is not unreasonable to suppose that they may contain information directly or indirectly enabling the party seeking discovery, either to advance his own case, or to damage the case of his adversary.—The plaintiff company sued the defendant company for breach of contract; the defence to the action was that no contract had been concluded, and that only negotiations had taken place between the parties. The defendants having obtained an order for an affidavit of documents, the plaintiffs set out, amongst others, their minute-book, which referred to certain documents and letters; the entries as to these documents and letters were of a date subsequent to the date of the alleged breach of contract; the documents and letters were not set out by the plaintiffs in their affidavit. The defendants claimed a further and better affidavit from the plaintiffs, setting out the documents and letters above-mentioned, on the ground that they might shew that after the alleged breach the parties were still negotiating, and might tend to disprove the plaintiffs' allegation that a contract had been concluded:—*Held*, that the plaintiffs were bound to make a further affidavit of documents. COMPAGNIE FINANCIERE ET COMMERCIALE DU PACIFIQUE *v.* PERUVIAN GUANO Co. **C. A. 55**

7. —— *Inspection of Documents—Title Deeds in Custody of Court.*] In an action of trespass to land brought against the committee of a lunatic whose title-deeds are in the custody of the Court having jurisdiction in Lunacy, an order on the defendant for inspection of the documents ought not to be made, as they are not in his possession or control. VIVIAN *v.* LITTLE - - **370**

8. —— *Interrogatories — Answer — Guardian ad litem:—"Party" to Action—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 100—*Order XVIII. —Order XXXI., r.* 1.] A guardian ad litem is not a party to the action within the meaning of Order XXXI., rule 1, and therefore cannot be compelled to answer interrogatories. INGRAM *v.* LITTLE - - - - - - **251**

9. —— *Pleading—Discontinuance of Action—Counter-claim—Rules of Court*, 1875, *Order XIX., r.* 3; *Order XXIII., r.* 1.] By discontinuing an action after a counter-claim has been delivered, a plaintiff cannot put an end to it so as to prevent the defendant from enforcing against him the causes of action contained in the counter-claim.—*Vavasseur* v. *Krupp* (15 Ch. D. 474) overruled. MCGOWAN *v.* MIDDLETON - - **C. A. 464**

10. —— *Judicature Act*, 1873, *s.* 25, *sub-s.* 8—*Appointment of Receiver—Reversionary Interest.*] The plaintiff, who had obtained judgment against the defendants, husband and wife, was upon his application ex parte appointed receiver of the income of the wife's reversionary interest under a will. FUGGLE *v.* BLAND - - - **711**

PRACTICE—*continued.*

11. —— *Referee — Application to set aside Findings—With what Time and how made—Judicature Act*, 1873, *ss.* 56–58—*Order XXXVI., r.* 34 *Order XXXIX., r.* 1 *a*—*Order LIII., rr.* 2, 3.] Where on a reference under s. 57 of the Judicature Act the unsuccessful party desires to question the findings of the referee, the proper course is to move the Court on notice under Order LIII. to the other party, and such a motion need not be made within the time limited by Order XXXIX., rule 1A for moving for a new trial in an action tried by a jury. DYKE *v.* CANNELL - 180

—— Costs—Amendment of pleadings - 627
See COPYRIGHT

—— Judgment recovered—Separate actions in respect of same cause of action - 712
See JUDGMENT RECOVERED.

—— Mayor's Court—Execution upon judgment
See MAYOR'S COURT. [120

PRINCIPAL AND AGENT—*Foreign Commission Agent and his Principal—Goods consigned not of Description ordered—Measure of Damages.*] The plaintiff, a merchant in London, gave orders to the defendants, commission agents in Hong Kong, to purchase for him a quantity of a certain kind of opium. No such opium could then be obtained at Hong Kong, but instead of informing the plaintiff of this fact, the defendants by mistake informed him that they could procure it, and they purchased and shipped to the plaintiff opium which they erroneously supposed to be such as was ordered, but which was really of an inferior description:—*Held*, that the relation between the plaintiff and the defendants was not that of vendor and purchaser but of principal and agent, and that therefore the true measure of damages which the plaintiff was entitled to recover was not the difference between the value of the opium ordered and that shipped, but the loss actually sustained by the plaintiff in consequence of the opium not being of the description ordered. CASSABOGLOU *v.* GIBB - - - - - C. A. 797

2. —— *Guarantee—Signature by Agent both for Principal and in his own Right—Parol Evidence.*] By articles of agreement under seal between J. A. & Co. and Y. & Co., Y. & Co. agreed to do certain work for which J. A. & Co. were to make certain payments, and the agreement contained this clause, "It is further understood between the parties to this contract that J. O. Schuler guarantees payment to Y. & Co. of all moneys due to them under this contract." The attestation clause was "signed and delivered by the said J. A. & Co. in the presence of C. T.," and Schuler, acting under a power of attorney, signed as follows: "P.P.A.—J. A. & Co., J. O. Schuler." Y. & Co. sued Schuler as guarantor, and evidence was given at the trial of statements by Schuler at the time of execution that he intended to sign on his own behalf as well as on that of A. & Co. A verdict was found for the plaintiffs. Schuler moved for a new trial on the ground that he had not signed the guarantee:—*Held*, affirming the decision of the Queen's Bench Division, that evidence that Schuler intended to sign in his own right as well as on behalf of A. & Co. did not contradict the document, and

PRINCIPAL AND AGENT—*continued.*

was admissible, and that Schuler must be taken to have signed as a contracting party. YOUNG *v.* SCHULER - - - - - C. A. 651

PRISON — *Governor—Superannuation—Compensation — Allowance — Superannuation Act*, 1859 (22 *Vict. c.* 26), *s.* 7—*Prison Act*, 1877 (40 & 41 *Vict. c.* 21), *s.* 36.] At the time of passing the Prison Act, 1877, C. was the governor of a prison, which, pursuant to that statute, was transferred to the Secretary of State for the Home Department. The justices of M. had been the local authority having the control of the prison. C. retired from his appointment soon after the coming into force of that Act, and the Commissioners of the Treasury awarded to C. an annuity of 582*l.* 13*s.* 4*d.*, and apportioned it as follows: 429*l.* 6*s.* 8*d.* to be borne by the justices of M., and 133*l.* 6*s.* 8*d.* to be borne by grants provided by Parliament. At the time of his retirement C. was less than sixty years of age, and he had not become incapable from sickness, age, or infirmity, or injury, of executing his office in person, and he retired for the purpose of facilitating improvements in the management of the prison. The justices having declined to pay the sum of 429*l.* 6*s.* 8*d.*:—*Held*, by Brett, M.R., and Lindley, L.J., Bowen, L.J., doubting, that the Commissioners had jurisdiction to apportion the annuity granted to C. in the manner above-mentioned, and that a mandamus would lie to compel the justices of M. to pay the amount apportioned upon them. THE QUEEN *v.* JUSTICES OF MIDDLESEX - - - - C. A. 656

PRODUCTION OF DOCUMENTS—Further affidavit - - - - - 55
See PRACTICE. 6.

RAILWAY COMPANY—*Contract—Ultrà Vires—Charge for Weighing Goods carried by Railway Company.*] A railway company carried coals on their line for the defendants, who were coal merchants, and delivered them at the defendants' wharf which adjoined a siding at one of the company's stations, and they allowed the defendants, in consideration of paying a specified reasonable charge, to weigh out the coals to customers by a machine belonging to the company placed in the station yard. The company had no express statutory power to make charges for the use of their weighing-machines:—*Held*, that the charges were not ultrà vires, and the company could maintain an action to recover them from the defendants. LONDON AND NORTH WESTERN RAILWAY CO. *v.* PRICE - - - - - - 485

2. —— *Mines—Right of Support to Surface Land—Railways Clauses Consolidation Act*, 1845 (8 *Vict. c.* 20), *ss.* 77, 87, 79.] In 1865 the owner of land demised the minerals under it to the defendant for a term of years, and in 1867 such owner conveyed the surface of the land to a railway company under the compulsory powers of the Lands Clauses Consolidation Act, 1845, which was incorporated with the company's special Act, and some years afterwards the company sold part of such land as superfluous land to persons who ultimately sold it to the plaintiff. The railway company never purchased the minerals or made compensation to the defendant as such lessee under the powers conferred on them by the Rail-

RAILWAY COMPANY—*continued.*
ways Clauses Consolidation Act, 1845, and the defendant worked the mines in the usual manner of working in the district, and by so doing caused a subsidence which damaged some houses erected by the plaintiff upon the land.—In an action against the defendant for working the mines without leaving a sufficient support for the plaintiff's land:—*Held*, that the defendant had not interfered with any right of the plaintiff, who could have no greater right than the railway company from whom he derived his title, and that upon the construction of ss. 77, 78, and 79 of the Railways Clauses Consolidation Act, 1845, if a railway company has exercised the option it has under that Act of purchasing land under their compulsory powers without the mines and minerals thereunder, the owner, lessee, or occupier of such mines and minerals has a right to work the same without regard to whether such working will let down the surface, provided the working is according to the usual way in the district. POUNTNEY *v.* CLAYTON - C. A. 820

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See JUDGMENT RECOVERED. [712

REVENUE—*Income Tax—Company—Debenture Coupons payable Abroad—Deduction from Tax of Sums payable Abroad*—5 & 6 *Vict. c.* 35, *ss.* 100, 102, 159, *& Schedule D.*] An English company carrying on their business in Alexandria where their gains and profits were earned were held to be properly assessed to the income tax in respect of the whole of the profits of the concern, without any deduction on account of the interest on the debenture bonds of the company paid to the holders of such bonds in Alexandria; there being nothing in ss. 102 and 159 of the Income Tax Act (5 & 6 Vict. c. 35), to limit rule 4 in s. 100, which states that "no deduction shall be made on account of any annual interest or any annuity or other annual payment payable out of such profits or gains." ALEXANDRIA WATER CO. *v.* MUSGRAVE - - - - C. A. 174

2. —— *Legacy Duty*—36 *Geo.* 3, *c.* 52, *ss.* 6, 22—*Executor, Valuation of Property by—"Property which shall not be reduced into Money."*] By 36 Geo. 3, c. 52, s. 6, legacy duty shall be paid by the person taking the burden of the execution of the will upon delivery or payment of the residue of any personal estate to the person entitled, and by s. 22, where the residue shall consist of "property which shall not be reduced into money," the executor may set a value thereon, and the Commissioners of the Inland Revenue may accept duty upon that value. Shortly after the death of a testatrix her executor brought into the Inland Revenue Office the residuary account of her property, in which a value was set upon

REVENUE—*continued.*
certain pictures and other personal property not reduced into money, and the Commissioners accepted duty upon that value. Subsequently—the residuary legatee and the executor having always intended that the pictures should be sold in the course of the administration—the executor sold them for a sum greatly in excess of the value upon which duty had been paid, and accounted to the residuary legatee for the proceeds:—*Held*, that the provisions of s. 22 apply to property which shall not be reduced into money during the course of the administration by the executor, and not merely to property which shall not have been reduced into money when the residuary account is brought in; that the pictures, &c., therefore did not satisfy the description in s. 22, and that the Crown were entitled to duty under s. 6 upon the amount paid to the legatee. ATTORNEY-GENERAL *v.* DARDIER - - - - 16

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—— Order XLV., r. 2 - - - 518
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SALE OF GOODS—*Payment in exchange for Bills of Lading—Bill of Lading drawn in Sets of Three—Tender of Two only—Time when Tender to be made—Right of Vendee to reject.*] Where by the terms of the contract of sale of goods to be shipped payment is to be made in exchange for bills of lading of each shipment the purchaser is bound to pay when a duly indorsed bill of lading, effectual to pass the property in the goods, is tendered to him, although the bill of lading be drawn in triplicate, and all the three are not then tendered or accounted for; and, if he refuses to accept and pay, he does so at his own risk as to whether it may turn out to be the fact or not that the bill of

SALE OF GOODS—*continued.*
lading tendered was an effectual one, or whether there was another of the set which had been so dealt with as to defeat the title of the purchaser as indorsee of the one tendered.—*Per* BRETT, M.R., the seller of such goods should make every reasonable exertion to forward the bills of lading to the purchaser as soon as possible after the shipment, but there is no implied condition in such a contract that the bills of lading shall be delivered to the purchaser in time for him to send them forward so as to be at the port of delivery, either before the arrival of the vessel with the goods or before charges are incurred there in respect of them. SANDERS *v.* MACLEAN **C. A. 327**

2. —— *Stoppage in transitu—Termination of Transit—Ulterior and Subsequent Transit—Goods stopped in Possession of Forwarding Agent of Vendee.*] When goods have been sent by an unpaid vendor through a carrier to a forwarding agent, who has been appointed by the vendee, and who receives the necessary orders from the vendee and not from the vendor, the transit of the goods upon reaching the hands of the forwarding agent is at an end and the right to stop in transitu is lost, even although the goods may have been intended to be sent to an ulterior and subsequent destination—L. bought certain goods of W. at Bolton, saying nothing as to the place of delivery. L. afterwards arranged with M. that the goods should be sent by steamer from Garston to Rouen. L. then instructed W. to send the goods to M. at Garston. W. accordingly despatched the goods by railway. The railway company gave notice to M. of the arrival of the goods, and further gave notice that they would hold the goods as warehousemen. L. then filed a petition for the liquidation of his affairs by arrangement; he had not paid W. for the goods. W. thereupon stopped the delivery of the goods, and M. returned them to him. The trustee in liquidation of L. having brought an action against M. and W. to recover the value of the goods:—*Held*, that the transit of the goods had ceased when the goods reached Garston and came into the possession of M., as forwarding agent for L., that the right to stop in transitu was then at an end, and that the trustee was entitled to recover the value of the goods. KENDAL *v.* MARSHALL, STEVENS & CO. **C. A. 356**

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SHIP—*Bill of Lading—Perils of the Sea—Collision—Negligence.*] A collision between two vessels brought about by the negligence of either of them, without the waves or wind or difficulty of navigation contributing to the accident, is not "a peril of the sea" within the terms of that exception in a bill of lading. WOODLEY *v.* MICHELL **C. A. 47**

2. —— *Charterparty—Discharge of Cargo—Discharge in Dock as ordered "if sufficient water."*] A charterparty provided that the ship should load with a cargo and proceed therewith to a port "to discharge in a dock as ordered on arriving if sufficient water, or so near thereto as she may safely get always afloat":—*Held*, that the ship was only bound to discharge in the dock named if there was sufficient water there at the time the order was given. ALLEN *v.* COLTART - - - **782**

3. —— *Charterparty—Commencement of Lay Days—"Frost preventing Loading."*] By the terms of a charterparty the ship was to proceed to the port of loading and there load a cargo of iron in the customary manner from the agents of the freighters: "Cargo to be supplied as fast as steamer can receive. . . . Time to commence from the vessel being ready to load and unload and ten days on demurrage, over and above the said lay days, at 40*l.* per day. [Except in case of hands striking work, or frosts or floods, or any other unavoidable accidents preventing the loading and unloading; in which case owners to have the option of employing the steamer in some short voyage trade, until receipt of written notice from charterers that they are ready to resume employment without delay to the ship.]" On the ship's arrival she went into dock and the loading was commenced; but frost having afterwards set in, the canals, through which part of the cargo had to pass in lighters to reach the vessel, became impassable owing to ice, and the loading was wholly stopped for five days:—*Held*, on the authority of *Kay* v. *Field* (10 Q. B. D. 241), that the exception in the charterparty as to frost did not relieve the charterers from liability for demurrage, inasmuch as the detention of the cargo by ice occurred in the canals before the cargo reached the dock where the vessel was lying.—Judgment of Pollock, B. (8 Q. B. D. 600), reversed. COVERDALE *v.* GRANT - **C. A. 543**

4. —— *Charterparty—Cesser Clause—Bill of Lading—Incorporation of Conditions of Charterparty in Bill of Lading.*] A charterparty contained stipulations in the usual form for payment of freight and demurrage, and also a stipulation that "as this charterparty is entered into by the charterers for account of another party their liability ceases as soon as the cargo is on board, the vessel holding a lien upon the cargo for freight and demurrage." The charterers having placed the cargo on board at the port of loading, a bill of lading was signed whereby the goods were made deliverable to themselves at the port of discharge, "they paying freight and all other conditions as per charterparty." In an action by the shipowner against them, as consignees of the cargo, for demurrage in respect of delay at the port of discharge:—*Held*, that the cesser clause in the charterparty must be rejected as inapplicable in reading the bill of lading, which incorporated all the conditions of the charterparty applicable to the reception of the goods at the port of discharge, and therefore that the plaintiff was entitled to maintain the action. GULLISCHEN *v.* STEWART BROTHERS - - - **186**

5. —— *Charterparty — Demurrage — Port of Unloading—"At all times of tide and always afloat."*] A ship was chartered to unload at S. or "so near thereto as she may safely get at all times of tide and always afloat," and for delay in unloading the charterers were to pay demurrage. —The state of the tide prevented the ship from reaching S. for four days after she arrived at the

SHIP—*continued.*
nearest point where she was able to float:—*Held*, that, according to the terms of the charterparty this was a sufficient arrival of the ship at S. to found a claim for demurrage. HORSLEY *v.* PRICE [244

6. —— *Neglect of Seaman to join Ship—Merchant Shipping Act* (17 & 18 *Vict. c.* 104), *s.* 243—*Summary Proceeding before Justices—Exclusion of Civil Remedy — Employers and Workmen Act* (38 & 39 *Vict. c.* 90), *s.* 4.] The Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 243,—which enables a seaman who neglects without reasonable cause to join his ship to be punished upon proceedings before a court of summary jurisdiction with imprisonment and forfeiture of part of his wages—by implication takes away any other remedy against the seaman for the breach of contract, and the shipowner cannot, where the amount which he claims does not exceed 10*l.*, take proceedings for the recovery of damages under the Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), s. 4. GREAT NORTHERN STEAMSHIP FISHING COMPANY *v.* EDGEHILL - - 225

SOLICITOR—*Bill of Costs—Order for Delivery of Bill after Payment—6 & 7 Vict. c.* 73, *s.* 41.] Where twelve calendar months have elapsed since payment of a solicitor's bill of costs by his client, such bill, although not signed by the solicitor, is prohibited by 6 & 7 Vict. c. 73, s. 41, from being referred to taxation. *In re* SUTTON & ELLIOTT [C. A. 377

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VENDOR AND PURCHASER—*Breach of Covenant for quiet Enjoyment—Decree in Equity a Disturbance in Possession.*] In a conveyance of land by the defendant to the plaintiff the defendant covenanted for title and quiet enjoyment notwithstanding any act or thing done or suffered by him or by any of his ancestors or predecessors in title. After the conveyance a decree was made in a suit in Chancery in which the plaintiff, though not a party, was represented as being one of a class of persons against whom the suit was brought, and by the decree the land so conveyed by the defendant was declared to be subject to a general right of common over it:—*Held*, that the decree alone, without any entry or actual disturbance of the plaintiff in his possession, was no breach of the defendant's covenant for quiet enjoyment:—*Held*, also, that the Court, in the absence of evidence of a grant of such right of common by some predecessor in title of the defendant, would not infer that there must have been such grant so as to be a breach of his covenant for title within the meaning of the covenant. Howard *v.* Maitland [C.A. 695

2. —— *Deposit—Forfeiture for Non-completion—Payment by Bankrupt in Fraud of Creditors—Right to follow Money.*] A bankrupt, having disposed of his goods in fraud of his creditors, opened an account in a bank with the proceeds, and having entered into a contract for the purchase of land in an assumed name, paid a deposit to the defendant, the auctioneer, by a cheque drawn upon the bank. The vendor and the defendant acted bonâ fide and without notice of the bankruptcy or of the fraudulent conduct of the bankrupt:—*Held*, that the bankrupt's trustee was not entitled to recover the deposit from the defendant so as to prevent it from being forfeited to the vendor upon the non-completion of the contract. Collins *v.* Stimson - - - - - 142

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WATERCOURSE—*Diversion of Stream—Alteration of Natural Flow—Action by Riparian Owner—Grant to non-Riparian Landowner.*] A riparian owner cannot, except as against himself, confer on one who is not a riparian owner any right to use the water of the stream, and any user by a non-riparian proprietor, even under a grant from a riparian owner, is wrongful, if it sensibly affects the flow of the water by the lands of other riparian proprietors.—*Stockport Waterworks Company* v. *Potter* (3 H. & C. 300) approved. Ormerod *v.* Todmorden Joint Stock Mill Company [C. A. 155

WATER-RATE—"*Annual Rent*," *how to be estimated*—"*Voids*"—*Owner compounding for Rates—Repairs and Insurance.*] It was provided by a Water Act that the charge to be made for the supply of water for domestic use should be at a rate varying according to the "annual rent" of the premises supplied.—The appellant was the owner of certain houses supplied with water by the respondents under the Act. The houses were let at weekly rents, the appellant paying all rates charged thereon, and also for all repairs and insurances in respect thereof. He was allowed, as an owner, under 32 & 33 Vict. c. 41, s. 4 (the Poor-rate Assessment and Collection Act, 1869), a deduction of 30 per cent. from the full amount of the poor-rate which an occupier if rated would have paid.—The respondents charged the appellant with water-rates calculated on the following basis: they multiplied the weekly rents by fifty-two and deducted from the amount so arrived at the actual sums paid by the appellant for rates, and then charged the water-rates upon the balance:—*Held*, that, in order to arrive at the "annual rent" upon which the water-rate was to be computed, an allowance should be made in respect of "voids," i.e., houses lying vacant from time to time; and that the actual amount of the poor-rates and other rates paid by the appellant was rightly deducted, but that the appellant was not entitled to deduct the full amount of the rates which an occupier if rated would have paid; nor the amount which he paid for repairs and insurances.—Meaning of the terms "annual rent"

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WRECK—*Removal of—Harbour Authority, Liability of—Acts, Local and General, Construction of.*] By Act of Parliament 26 & 27 Vict. c. lxxxix. the Harbour of B. was vested in the defendants, the limits were defined, and the defendants had jurisdiction over the harbour of P. and the channel of P. beyond those limits for the purpose of, inter alia, buoying "the said harbour and channel," but they were not to levy dues or rates beyond the harbour of B. By 42 & 43 Vict. c. cxlvi. a moiety of the residue of light duties to which ships entering or leaving the harbour of P. contributed, were to be paid to the defendants and to be applied by them in, inter alia, buoying and lighting the harbour and channel of P. A vessel was wrecked in the channel of P., which under the Wrecks Removal Act, 1877 (40 & 41 Vict. c. 16), s. 4, the defendants had power to, and did partially, remove. The wreck not removed was not buoyed, and the plaintiff's vessel was in consequence wrecked:—*Held*, that the statutes imposed upon the defendants an obligation to remove the wreck from the channel or to mark its position by buoys, and that not having done so they were liable in damages to the plaintiff. DORMONT *v.* FURNESS RAILWAY CO. - - 496

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